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Yusuf, Hakeem (2018). African Transitional Justice Research Project: Case Study on Transitional Justice in Nigeria. Centre for the Study of Violence and Reconciliation, South Africa, South Africa.

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COMPARATIVE STUDY OF TRANSITIONAL JUSTICE IN AFRICA

NIGERIA

HAKEEM YUSUF

2018

African Transitional Justice Research Project: Case Study on Transitional Justice in Nigeria

INTRODUCTION

Nigeria, a multi-religious and ethnically diverse country with over 350 ethnicities,¹ typifies the legacy of British colonialism in sub-Saharan Africa. Given this diversity, it is not unusual that conflict has belied the country's transition to democracy, and transitional justice has attempted to be a mechanism through which this is achieved – even with challenges to its broader enforcement. This report draws on documents and interviews to analyse the implementation of transitional justice measures in Nigeria. It examines the current state of affairs regarding justice for the past and reform of institutions in the country.

Nigeria as we know it today is a creation of British colonial rule from the amalgamation of the Northern and Southern Protectorates of Nigeria by Lord Frederick Lugard in 1914. The peoples of the various kingdoms and empires in the territories now known as Nigeria first came into contact with Europeans from about 1450 through the trade of slaves, particularly with the Portuguese. The British arrived in 1539² but British colonial rule in Nigeria commenced with the annexation of Lagos as a Crown Colony in 1861.³ Nigeria achieved independence from British colonial rule on 1 October 1960, making it one of the first countries to gain independence in West Africa. However, the

¹ *National Conference 2014: Final Draft of Conference Report* (14 August 2014) 52 available at: <http://www.premiumtimesng.com/national-conference/download-nigeria-2014-national-conference-report-ngconfab-2/> (accessed 15 May 2017).

² Ralph Uwechue *Reflections on the Nigerian Civil War: Facing the Future* (Africana Publishing Corporation New York 1971) 3.

³ A narrative of how the cession came about is provided in *Attorney General of Southern Nigeria v John Holt and Company (Liverpool) Limited and Others* [1915] A.C 1, 4-7.

country remained a Commonwealth realm with Queen Elizabeth II as the titular Head of State until 1 October 1963 when Nigeria became a republic, thereby cutting off the remaining direct tie to British authority.

Post-independence, Nigeria's substantial natural resources have not been translated into development for its teeming population. The country has had a severely chequered history of development and democratic governance, experienced a civil-war and nearly three decades of military rule. After many failed promises, the military eventually handed over power to an elected government on 29 May 1999 with the promulgation of a hurriedly produced and imposed Constitution. The transition to civil rule followed a period of strong and sometimes violent agitation. Ironically, the eventual civil transition programme was accidental at best, and was not negotiated between the civil populace and the military rulers. As a result, some have argued that the very legal basis of the political transition programme remains illegal as

politicians campaigned for offices, participated in elections, were elected yet there was no *grundnorm*, there was no constitution. Elections had been conducted before the military government that was leaving power [had] promulgated a Constitution.⁴

The country has continued to struggle with political and social instability and a shaky rule of law. Structural disequilibrium created by military authoritarian rule has remained the most contentious among a number of issues at the core of agitations for renegotiating the country's federalism. Separatist agitations have returned to the front burner in the country. There have been recent calls for secession of the Eastern region

⁴ Interview with Nurudeen Ogbara (lawyer, human rights and democracy activist) former Executive Secretary of the National Association of Democratic Lawyers; former Chair, Nigeria Bar Association, Ikorodu Branch (Lagos State); Lagos, Nigeria, 4 April, 2017. See also Tunde I. Ogowewo 'Why the Judicial Annulment of the Constitution of 1999 is Imperative to the Survival of Nigeria's Democracy' (2000) 44 *Journal of African Law* 135.

by groups advocating for a return of the 'Republic of Biafra' and there are fears that these may lead to another round of violence and, or civil war.⁵ Demands for fiscal federalism, the control of proceeds from oil and gas and other natural resources like gold, uranium, coal and tin, have been a major source of contention.

The democratic dispensation has been marked by serial violence and continuing impunity by state and non-state actors.⁶ To cite three recent examples: First, over 350 members of the Islamic Movement of Nigeria (IMN) were believed to have been unlawfully killed by the military in a three day operation from 12 - 14 December 2015 following a confrontation with soldiers in Zaria, Kaduna State, North Central Nigeria.⁷ The IMN members, some of whom were armed with batons, knives, and machetes had refused to clear away from the road near their headquarters. The army alleged they attacked the convoy of the Chief of Army Staff in a bid to assassinate him. To cover up their actions, the soldiers carted away the bodies of the victims and buried them in shallow graves. Some of the corpses of victims were burnt. Three children of the leader of the group, Ibrahim Zakyzaky, were killed in a siege on his home by soldiers. Zakyzaky's house as well as the group's headquarters was levelled to the ground by soldiers. 100 members of the group were arrested and are on trial while the leader who was fatally injured, as well as his wife, has remained in detention without trial. No one has been brought to justice for the mass killings.⁸ Second is the case of the *Jama'atu*

⁵ Fisayo Soyombo 'Is Nigeria on the Brink of Another Civil War? - On the 50th Anniversary of its Bloody Civil War, Nigeria is Struggling to Prevent Another' *Al-Jazeera* available at: <http://www.aljazeera.com/indepth/opinion/2017/07/nigeria-brink-civil-war-170712131405928.html> (accessed 15 July 2017)

⁶ Amnesty International *Nigeria: Trapped in the Cycle of Violence* (Amnesty International 2012); International Crisis Group *Curbing Violence in Nigeria (I): The Jos Crisis* (2012) Africa Report No.196

⁷ Amnesty International 'Nigeria: Military Cover-Up of Mass Slaughter Exposed' (2016) *Press Release* <https://www.amnesty.org/en/press-releases/2016/04/nigeria-military-cover-up-of-mass-slaughter-at-zaria-exposed/> (accessed 07 July 2017).

⁸ Amnesty International (2016).

Ahlus-Sunnah Lidda'Awati Wal Jihad, commonly known as *Boko Haram* (western education/civilisation is evil) involved in an insurgency in the country. In April 2014, the group drew international concern with the kidnapping of more than 270 school girls from a government secondary school for girls at Chibok, Borno State, North East Nigeria in May 2014. This was ostensibly in a bid to secure the release of detained Boko Haram members. The immediate cause of the recourse to arms and violence by the group was the unlawful killing of their leader, Mohammed Yusuf in July 2009 by the police following his arrest by the army in a peaceful protest organized by Boko Haram. Repeated demands for justice for his extra-judicial execution by the Police went unheeded. Hundreds of his supporters had also been killed at the time.⁹ The *Boko Haram* insurgency has been regarded by some as a manifestation of 'Islamic' fundamentalism. However, relevant stakeholders, local voices at, close to, or otherwise connected to the epicentre of the violence have maintained an alternative narrative. On this account, the violence is a product of social displacement and neglect, abject poverty and gross disenchantment with government by some elements from that least developed part of the country.¹⁰ As a concerned group recently observed

The underlining narrative of Boko Haram is the offer of an alternative state that not only postulates to be theologically legitimate, but also seeks out the forgotten welfare of the people.¹¹

⁹ Freedom Onuoha 'Why Do Youth Join Boko Haram?' (2014) *United States Institute for Peace Special Report* #348 1-12.

¹⁰ Onuoha *ibid.* For analyses of the Boko Haram insurgency, see Andrew Walker 'What Is Boko Haram?' (2012) *United States Institute for Peace Special Report* #308; Azeez Olaniyan and Lucky Asuelime 'Boko Haram Insurgency and the Widening of Cleavages in Nigeria' (2014) 7 (2) *African Security* 91-109; Oarhe Osumah 'Boko Haram Insurgency in Northern Nigeria and the Vicious Cycle of Internal Insecurity' (2013) 23 (3) *Small Wars and Insurgencies* 536-560.

¹¹ Samuel Ogundipe 'How to End Poverty, Illiteracy, Other Crisis in Northern Nigeria — Sultan, Onaiyekan, Jega, Others' *Premium Times* (02 August 2017 Abuja)

In the southern part of the country, militant groups in the Niger Delta had previously attracted international attention with violence there - mainly in the form of bombing oil installations, attacks on state security agents and kidnapping of local and expatriate oil workers - impacting on world oil prices. The violence in the Niger Delta is closely linked to agitations by some groups for local control or a better share of the oil revenue which is the mainstay of the country's economy in the face of socio-economic and infrastructural neglect, and a despoiled environment.

Significantly, notwithstanding political transition to civil rule, the military (and military elites) has continued in power in democratic Nigeria. The military's continuing hold on power has been a major factor that underwrites the neutralisation of meaningful attempts at transitional justice and institutional reform in the country. The entrenchment of the military old-guard and their acolytes has become a critical dynamic that defines the interests and priorities of the political elite, and transitional justice is not one of these priorities. If anything, the political elite consider transitional justice as threat to their power.

With the benefit of deep-pockets deriving from corruption, rent-seeking and nepotism established during three decades in power, the military has maintained a system of gate-keeping in the post-authoritarian period. A major indicator of this is that in seventeen years of the post-authoritarian period, Nigeria has been ruled by either a former military ruler or their anointed candidate. Indeed, the political transition to civilian rule was an exercise in which a military Head of State (General Abdusalami Abubakar) in *khaki* handed over power to an elected, retired former military Head of

<http://www.premiumtimesng.com/news/headlines/238923-end-poverty-illiteracy-crisis-northern-nigeria-sultan-onaiyekan-jega-others.html>

State (retired General Olusegun Obasanjo) in *agbada*, as President.¹² Former military men who held political positions emerged as State governors, members of the upper and lower houses of Parliament and even head of the upper house of Parliament (the Senate). Further, former and serving senior military rulers have either been installed traditional rulers (especially in the Northern part of the country, including the two highest such positions in the former Sokoto Caliphate) or played decisive roles in determining who gets appointed.

The report proceeds as follows. The first part examines the historical context. This includes a focus on the legacies of colonisation on the transitional justice landscape in the country. The colonial legacy of unaddressed impunity played a major role in shaping transitional justice in the country. The inception of military rule followed closely on the heels of the end of colonial rule. A civil war erupted in Southern Nigeria during the early days of the period of military rule, and would continue to define Nigeria's political history into the 21st century. Part two focuses on the political transition from authoritarian military rule to a democratic dispensation after three decades under military leadership. The discussion is mainly concerned with the nature of the transitional justice measures introduced as part of political change in the country in 1999. The truth-seeking process embodied by the Human Rights Violations Investigation Commission¹³ (Oputa Panel)¹⁴ is central to this, but the discussion also considers the limited lustration of a number of erstwhile military officers as well as few

¹² *Khaki* is the colloquial term for the military uniform; *Agbada* is men's free-flowing traditional wear worn in most parts of the country and favoured especially for ceremonial occasions but also commonly worn by the political class.

¹³ This is the official title adopted by the body and under which its report was submitted. Initially styled 'The Human Rights Investigation Panel', it was later renamed 'The Judicial Commission for the Investigation of Human Rights Violations in Nigeria'.

¹⁴ So named after the chairman. See Hakeem O. Yusuf 'Travails of Truth: Achieving Justice for Victims of Impunity in Nigeria' (2007) 1 (2) *International Journal of Transitional Justice* 268

prosecutions of some key members of the notorious Abacha military regime (1993-1998). The Oputa Panel did a commendable and largely well-received job. However, while the work of the Panel assisted the bid to legitimise the post-authoritarian civilian administration, any other successes recorded by the process were overshadowed by the failure of the Obasanjo administration to implement its recommendations. Part three analyses the aftermath of the Oputa Panel, the ensuing governance gap, the dilemma of unreformed institutions and continuing impunity in the country. Part four evaluates the current state of transitional justice and is then followed by the conclusion.

HISTORICAL CONTEXT

The Colonial Legacy and Early Phase of Nationhood

During the colonial period, the British did not attempt to bridge the ethnic divides existing in the country.¹⁵ Rather, the British practiced a system of 'indirect rule' which promoted and increased the existing differences.¹⁶ An important legacy of colonial rule was the organisation of government along ethnic lines, using existing or manipulated traditional leadership structures in the three regions: Northern, Eastern and Western¹⁷ dominated by the Hausa-Fulani, Ibo (or Igbo) and Yoruba respectively. The regional structure meant that at independence, the 'strong desires' of the other ethnic groups for 'self-determination' were either not properly recognised or sufficiently addressed.

¹⁵ Daniel E. Agbiboa 'Ethno-Religious Conflicts and the Elusive Quest for National Identity in Nigeria' (2012) 44 (1) *Journal of Black Studies* 3-30, 13-16; Pade Badru 'Ethnic Conflict and State Formation in Post-Colonial Africa: A Comparative Study of Ethnic Genocide in the Congo, Liberia, Nigeria and Rwanda-Burundu' (2010) 27 (2) *Journal of Third World Studies* 149, 159.

¹⁶ Samson C. Ukpabi 'Nigeria: The Issues of War and Peace' in Tekena N. Tamuno and Samson C. Ukpabi (eds.) *Nigeria Since Independence- The First 25 Years: The Civil War Years* (Vol. 7 Heinemann Educational Books (Nigeria) Ltd 1989), 107-124, 110.

¹⁷ They became four with the creation of the Mid-Western region in 1963.

Consequently, the 'arbitrary grouping' was a 'major cause of instability' in the country.¹⁸ Efforts to manage the unstable arrangements bequeathed by colonial rule in this regard have included the gradual creation of sub-national units (States) which now number 36, the constitutionalisation (since 1979) of a federal character principle for national integration¹⁹ including a provision in the 1999 Constitution that a Minister must be appointed from each of the States as well as an informal recognition of six geo-political zones. Significantly, however, the country has continued to be challenged by the absence of a national identity with ethnic strife simmering throughout the period of military rule.²⁰

Federalism in Nigeria is generally viewed as an expedient choice to accommodate diverse groups with distinct ethnic-identities, language, culture, religion, and even geographical locations brought together under British colonial rule.²¹ The principle was introduced by the British in 1946 through the Richards' Constitution following the demands of the nationalist leaders²² though it was formally put into practice only through the 1954 Constitution.²³ In this regard, it has been argued that the

uneven modernisation and differential administration of the protectorates under colonial rule (coupled with the artificial boundaries), engendered strong

¹⁸ 'Statement at a Press Conference on the Nigerian Crisis in the Connaught Rooms, Kingsway, London, on Monday July 17, 1967 by Chief Anthony Enahoro, Nigerian Federal Commissioner of Information and Labour' reproduced in Tamuno and Ukpabi (1989), 'Appendix to Chapter One'; 42-48, 43.

¹⁹ This requires ethnic spread and States' representation in the composition of the Federal Government and federal bodies As provided in Section 14 (3) of the Constitution of the Federal Republic of Nigeria 1999. Similar provisions are made in respect of the States, Section 14 (4); see for a discussion Ladipo Adamolekun, John Erero and Basil Oshionebo "'Federal Character" and Management of the Federal Civil Service and the Military' (1991) 21 (4) *Publius*: 75-88.

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²¹ Ladipo Adamolekun and S. Bamidele Ayo (1989) 'The Evolution of the Nigerian Federal Administration System' 19 (1) *Publius*: 157, 157.

²² *National Conference 2014: Final Draft of Conference Report* (14 August 2014) 6 available at: <http://www.premiumtimesng.com/national-conference/download-nigeria-2014-national-conference-report-ngconfab-2/>

²³ Akintunde O. Obilade *Nigerian Legal System* (Spectrum Law Publishing Ibadan 1990) 33.

regionalist pressures for the introduction of full-fledged federalism to replace the unitary (albeit decentralised) colonial administration.²⁴

The country's experience of the application of fundamental principles of federalism has been affected by the political experience of three decades of military authoritarianism. In principle, successive military regimes in the country maintained the federal political system, no doubt to assuage feelings of alienation and reduce potential antagonism to its imposed rule. However, the command-structure style of governance did not accommodate agitations for political restructuring of the country. The military governors 'were more like military prefects in a French-style provincial administration than leaders of sub-national units with any meaningful autonomy.'²⁵ Many interest groups were unhappy with the situation but felt disempowered by military authoritarianism to challenge this.

By the time the country returned to civil rule, governance in the country had become over-centralized. A distorted federal system is one of the most problematic legacies of military rule and a continuing source of tensions and violence in the country. Oil wealth made the control of the centre (and the control it had acquired over oil resources) particularly attractive.²⁶ Over time, the federal government accumulated so many powers that it dominates virtually every aspect of governance in the country including vital aspects of land matters within States, commerce and trade, weight and measures, social security, police and policing, arms and ammunition and labour. This is reflected in the statement of competencies of the levels of government in the legislative lists

²⁴ Rian Leith and Hussein Solomon 'On Ethnicity and Ethnic Conflict Management in Nigeria' (2001) *ACCORD* <http://www.accord.org.za/ajcr-issues/on-ethnicity-and-ethnic-conflict-management-in-nigeria/> (Accessed 04 July 2017).

²⁵ Adamolekun and Ayo (1989) 163.

²⁶ Jonas Isawa Elaigwu 'Federalism in Nigeria's New Democratic Polity' (2002) 32 (2) *Publius* 73, 76.

contained in the Constitution. The 1999 Constitution assigned at least 66 broadly worded exclusive powers to the federal authorities. The exclusive powers are in addition to a concurrent (in practice, overriding) power, with the states, over 30 other items. This is a far cry from the position at independence. It is instructive in this regard for instance that the final act of British constitutional legislation in the country, the Nigerian (Constitution) Order in Council, 1960 enacted separate constitutions for the federal government and three regions.²⁷

Political analysts have identified the civil-war, the progressive unbundling of the three regions into States, the increased revenue derivable from oil, and globalisation as some of the key factors responsible for the over centralisation of power in Nigeria's federal system under the military. These have also been veritable sources of violence and conflict in the country. The experience of the civil war (and the emergency powers deployed as a result) and the creation of the States ostensibly to assuage agitations on perceived marginalisation, led to a fractionalisation that engendered the need for a strong homogenizing centre.

The observation by Dukes that 'underlying many disputes are struggles over power, status, and human needs such as identity, recognition, and security,'²⁸ is very apposite to Nigeria's post-authoritarian period from 1999 to date. The transition from military to civil rule provided the space for various hitherto constrained interest groups across the country to air grievances and feelings of injustice. This also meant that the undue centralisation of power took the centre-stage of socio-political discourse in the country. Political commentators have observed that there are 'intense pressures' for a review of

²⁷ 1960 No.1652 effective 1 October, 1960.

²⁸ Frank Dukes 'Public Conflict Resolution: A Transformative Approach' 9 (1) *Negotiation Journal* 45, 49 (1993).

the lopsided legislative list to States while the issue of resource distribution has led to 'heated debates' at the dawn of the 21st Century.²⁹

In its conduct of governance, the military hegemony acted as if the country was 'conquered territory' and its vast resources, 'spoils of war.'³⁰ Under their reckless governance, the country transformed rapidly from one of the richest nations, to one of the poorest.³¹ Although military incursions into power were proclaimed to be in pursuit of economic rectitude, unity and peace of the country,³² arguably none of these was achieved by the numerous military regimes. Rather, the military left the country in the low development human development category³³ and institutionalized corruption³⁴ which has remained a formidable obstacle to good governance in the country. By the time it left office, the military establishment had instituted a vicious cycle of violence which found expression in domestic violence, armed robbery, brigandage, religious riots, impunity and lawlessness in the polity.

The Military and the Police in Nigeria's Post-Independence Experience

As alluded to earlier, the military came to play a significant role in Nigeria's post-independence governance. They had in fact, also played a crucial role in colonial governance, beginning with the military domination of Northern Nigeria by Lugard prior to 1906. The military and police forces in the country emerged from the armed

²⁹ Elaigwu (2002) 73.

³⁰ Foreword by the Chairman, *Synoptic Overview Oputa Panel Report: Summary, Conclusions and Recommendations* (2004), 2-3.

³¹ Ibid.

³² G. N. K. Vukor-Quarshie 'Criminal Justice Administration in Nigeria: Saro-Wiwa in Review' (1997) 8 Criminal Law Forum 87, 104.

³³ United Nations Development Programme (UNDP) Human Development Index 2016 has positioned the country at 152 out of 188 countries and territories.

³⁴ Daniel Egiegba Agbibo 'Protectors or Predators: The Embedded Problem of Police Corruption and Deviance in Nigeria' (2015) 47 (3) *Administration and Society* 244, 254-256; M. A. O. Aluko 'The Institutionalization of Corruption and its Impact on Political Culture and Behaviour in Nigeria' (2002) 11 *Nordic Journal of African Studies* 393.

forces established by the British to enforce colonial rule in the various territories that became Nigeria. Historians like Toyin Falola have pointed out, colonisation in Nigeria was a product of violence achieved 'either by the use of war or surrender because of the threat of war'.³⁵ In addition to 'assisting the British imperialists to smash the resistance of local communities to political domination', they also maintained 'law and order' by suppressing riots, 'strikes and revolts'.³⁶ The two bodies were set up to subdue and subjugate the local communities in a manner that suited the interests of the colonial administration.³⁷ They lacked any connection to the people but owed full loyalty to the British rulers. The pioneering force was the Consular Guard established for Lagos (South West Nigeria) in 1861. It was made up of officers of Hausa ethnic origin from the Northern part of the country, they thus lacked any affinity with the people of Lagos (of Yoruba ethnicity) whom they were commissioned to protect. This approach to constituting the armed forces and the Police was a general and consistent policy in the colonial period.

The inherited roots of policing in institutionalised repression and violence constituted the Police into an organisation with questionable legitimacy in Nigerian society.³⁸ It was common to find that the Police engaged in various abuses of human rights including extortion, killing, maiming and looting. This pattern of policing was retained after independence and it plays an important negative role in the work of the Police in the

³⁵ Toyin Falola *Colonialism and Violence in Nigeria* (Indiana University Press Bloomington 2009) 1.

³⁶ Domkat Y. Bali 'The Defence of the Nation' in in Tamuno and Ukpabi (1989) 162-170, 162; on this, the Aba/Igbo women's uprising of 1929 is instructive – 50 women were killed by the colonial administration, see Judith Van Allen "'Sitting on a Man": Colonialism and the Lost Political Institutions of Igbo Women' (1972) 6 (2) Canadian Journal of African Studies, 165-181.

³⁷ See for instance Etannibi E.O. Alemika 'Colonialism, State and Policing in Nigeria' (1993) 20 (3) *Crime Law Social Change* 187-219.

³⁸ Agbibo (2015) 259-261; Etanibi O. Alemika & Innocent C. Chukwuma *Analysis of Police and Policing in Nigeria: A Desk Study on the Role of Policing as a Barrier to Change or Driver of Change in Nigeria* (CLEEN FOUNDATION Lagos Nigeria) 9-11.

country to date.³⁹ There is a continuing disconnect between the police and the society more than a century and a half after the colonial founding of the Police and military forces. As a former Deputy Inspector General of Police, Parry Osayande observed, the Police 'became estranged and alienated from Nigerians' right from 'the very first day' it was created.⁴⁰ It is instructive in this regard that in May 2017, the head of the Nigerian Police Force declared that a planned 150,000 more policemen to be recruited over the next five years will be deployed to serve in their respective communities to enhance 'community policing' and serve to reverse the historical legacy of the socio-cultural disconnect between the police and the communities they are meant to serve across the country.⁴¹

Independence and an Unaddressed Past

The current injustices in Nigeria are strongly connected to Nigeria's past experience of an unaddressed colonial past. The political class who took over the reins of power from the colonialists were quick to seize on, and perpetuate violence, human rights violations and non-accountability that had featured prominently in the colonial governance of Nigeria. Independence was achieved without the armed struggle that was experienced in some other parts of Africa.⁴² Such a struggle could have facilitated better cross-mobilisation of the various ethnic groups. As Ukpabi observed, this set the stage for a:

scramble for various forms of power (political, economic, and bureaucratic) which would give an ethnic group an edge over others. The situation was made worse by the fact that

³⁹ Open Society Institute and the Network on Police Reform in Nigeria *Criminal Force: Torture, Abuse, and Extrajudicial Killings by the Nigeria Police Force* (Open Society Institute New York 2010).

⁴⁰ Parry Osayande 'Creating Awareness on Concept and Principles of Civilian Oversight of Police' in I Chukwuma (ed) *Civilian Oversight and Accountability of Police in Nigeria* (Centre for Law Enforcement Education Lagos 2003) chp.9, 2.

⁴¹ 'Nigeria Police to Deploy Officers to Communities of Origin' *Premium Times* (Abuja 16 May 2017) available at: <http://www.premiumtimesng.com/news/231391-nigeria-police-to-deploy-officers-to-communities-of-origin.html> (accessed 16 may 2017).

⁴² Like Kenya or Guinea-Bissau for instance.

the people saw their security and their future to lie not in the guarantee of the Federal government but with their ethnic groups or with the government of their own Region or state.⁴³

Consequently, post-independence, the elite simply stepped in to governance armed ostensibly with a legitimacy that the former administration lacked, but proceeded to exploit the mobilised ethnic-based fissures in the polity inherited from the latter. The 'ruling class' that took over from the colonial government were 'content to run the [post] colonial state and society without any modifications whatsoever.'⁴⁴ Thus, rather than serve as agents for unifying and advancing the general well-being, the divided elite mobilised (and continue to mobilise) the ordinary people against each other in order to gain an advantage or maintain existing privileges.⁴⁵ In the process, the elite deliberately or inadvertently perpetuated conflict⁴⁶ which had been set in motion deliberately but also sometimes, unwarily by the colonialists.⁴⁷

Military Rule (1966-1999)

Inception of Military Rule and the Civil War 1967-1970

As alluded to earlier, authoritarian rule and violations of human rights formed the bedrock of British rule in Nigeria⁴⁸ and this mode of government soon overtook the democratic system instituted at independence. Following a period of political crises in the country arising from ethnic tensions interlaced with power struggles carried over

⁴³ Ukpabi (1989) 110

⁴⁴ B.O. Adebisi 'The Challenge of Independence: Major Issues before and After' in Tekena Tamuno and J.A. Atanda *Nigeria Since Independence- The First 25 Years: The Civil War Years* (Vol. 4 Heinemann Educational Books (Nigeria) Ltd 1989) 11-29, 18; Badru (2010) 159.

⁴⁵ For a detailed exposition on this issue, see Abdul Raufu Mustapha *Ethnic Structure, Inequality and Governance of the Public Sector in Nigeria* (United Nations Research Institute for Social Development Geneva 2006).

⁴⁶ Ukpabi (1989) 113-114.

⁴⁷ Mustapha (2006) 1-4.

⁴⁸ Falola (2009)

from the pre-independence period, democratic rule was cut short by a military *coup d'état* on 15 January 1966 thus leading to the demise of the country's first republic.⁴⁹ The coup also had a strong element of ethnic cleavage as it was the culmination of an armed insurrection organized and led by army officers mainly of Ibo extraction from the Eastern Region.⁵⁰ Eleven national leaders, including the Prime Minister were killed. As Arthur Nwanko rightly noted, 'The ethnic distribution of the casualties of the coup led to the allegation that this was an Ibo coup.'⁵¹

Following the coup, the most senior army officer and General Officer Commanding the Nigerian Army; Major General Johnson Thomas Aguiyi-Ironsi (an Ibo) became the military Head of State. He proclaimed a change from a federal to a unitary political system. However, a counter-coup led by officers from the Northern part of the country took place two months after.⁵² Along with General Aguiyi-Ironsi, thirty-two officers from Eastern Nigeria, mainly of the Ibo ethnicity were killed. A series of riots then erupted in the North in which hundreds (thousands according to some accounts) of Ibos were killed. The Eastern Region announced it was seceding from the country by declaring the Republic of Biafra on 30 May 1967. This followed failed attempts for reconciliation.⁵³ The secession bid led to a thirty-month civil war from 6 July 1967 to 12 January 1970 with the declaration of surrender by Biafra. Many lives were lost with

⁴⁹ Badru (2010) 159-161.

⁵⁰ Uwechue (1971) 7; It is relevant in this regard to note that at independence and up to the civil war, the Ibos constituted the bulk of the officer cadre of the Nigerian army however, things changed dramatically after the civil war, as officers from the North came to dominate the Nigerian army for a long time afterwards and definitely throughout the period of military rule. See Judd Devermont 'The US Intelligence Community's Biases during the Nigerian Civil War' *African Affairs* (2016) 116 (465): 705-716, 708.

⁵¹ Arthur Nwankwo *Nigeria: The Challenge of Biafra* (Rex Collings London 1972) 10-11; Uwechue similarly notes that: 'In many non-Ibo hearts, the one-sided pattern of the killings aroused suspicion that perhaps the coup was an attempt by Ibos to seize power in the country'. See Uwechue (1971) 29.

⁵² Uwechue (1971) 6

⁵³ Godwin Onuoha 'Shared Histories, Divided Memories: Mediating and Navigating the Tensions in Nigeria-Biafra War Discourses' *Africa Today* (2016) 63 (1): 3-21, 5.

some accounts claiming the figure ran into the millions.⁵⁴ Considerable properties and major infrastructure of vast areas of the Eastern part of the country were also destroyed.⁵⁵

The End of the Civil War: 'Rehabilitation, Reconstruction and Reconciliation'

The war was brought to an end largely due to a combination of war fatigue especially on Biafra side and the superior military power of the federal side. This circumstance led to the unilateral declaration of surrender by the Eastern Region government on 12 January 1970 and acceptance of it by the Federal Military Government on 15 January 1970 at a formal ceremony in Lagos. Consequently, the war is deemed to have officially ended on 15 January 1970 which is celebrated as Armed Forces Day in the country. In furtherance of its declared policy to unite the country, and achieve speedy reintegration of the people of the estranged Eastern Region, the Federal Government of Nigeria declared a 'general amnesty for those who misled into rebellion', 'healing the nation's wound' as well as 'reconciliation in full equality'.⁵⁶ The military Head of State, General Yakubu Gowon announced that there was 'no victor, no vanquished.' He stated government's plans for rehabilitating not just civil and public servants, but also the self-employed.⁵⁷ He further stated that 'special attention will be given to the rehabilitation of women and children in particular.'⁵⁸

⁵⁴ O.B.C. Nwolise 'The Social Consequences of the Civil War in Biafra' in Tekena Tamuno (ed.) *proceedings of the National Conference on Nigeria Since Independence* (Panel on Nigeria Since Independence 1984) 21-44, 39.

⁵⁵ Ibid.

⁵⁶ Major-General Yakubu Gowon 'The Dawn of Reconciliation' (Federal Ministry of Information Press Release No.47 'Broadcast to the Nation by the Head of the Federal Military Government and Commander-in-Chief of the Armed Forces, Major-General Yakubu Gowon, Thursday, January 15, 1970) in Tamuno and Ukpabi (1989) 76-79, 77.

⁵⁷ Ibid. at 77-78.

⁵⁸ Ibid. at 78.

A programme for ‘rehabilitation, reconstruction and reconciliation’ (3Rs)⁵⁹ was embedded in the country’s Second National Development Plan (2nd NDP)⁶⁰ (1971-1974) for post-war reconstruction and development. The plan had contained forty percent (40%) of the total public-sector capital investment⁶¹ as part of a wider agenda for ‘social change’.⁶² However, implementation of the plan was weak and the 3Rs had very limited implementation. The national development plans dated back to the colonial period and embedding the reconstruction and rehabilitation projects in them was problematic. It is not clear why the government took the NDP as its point of departure but the approach suggests inadequate appreciation of the requirement for a specific focus on the needs of the war-damaged areas which were largely in the South-eastern part of the country. In practice, the approach meant infrastructural losses and damage resulting from the war had to compete with a larger project of national infrastructural and socioeconomic development. This had a detrimental effect on the substantive reconstruction of the affected areas. For instance, a report in 2017 showed that the only bridge that provided external access to a community in the theatre of war which was damaged by federal troops has only just been earmarked for reconstruction only 47 years later.⁶³

Many victims were not compensated or rehabilitated at the time or at all. Nonetheless, a post-conflict measure that was implemented with considerable success was the welcome extended to the Ibos returning to other parts of Nigeria from where they had

⁵⁹ Olukunle Ojeleye *The Politics of Post-War Demobilisation and Reintegration in Nigeria* (Ashgate Farnham 2010) xiii.

⁶⁰ Ibid. at 2.

⁶¹ R. O. Ekundare ‘Nigeria’s Second National Development Plan as a Weapon of Social Change’ (1971) 70 (279) *African Affairs* 146, 152

⁶² Ibid. at 147.

⁶³ Emmanuel Ikora ‘47 years after Civil War: Govt Begins Construction of Link Roads to Isolated A’Ibom Communities’ *Vanguard Newspaper* (Abuja 16 April 2017) available at: <http://www.vanguardngr.com/2017/05/47-years-civil-wargovt-begins-construction-link-roads-isolated-aibom-communities/>

fled during the crisis leading to the civil-war. This has been described as a ‘tremendous success’:

Igbos [Ibos] were encouraged to return to their migratory entrepreneurialism, which carried them to all corners of Nigeria...to a large extent they were indeed welcomed, and certainly Igbos re-established their businesses and pan-Nigeria presence remarkably quickly.⁶⁴

In Lagos for instance, the Ibos were able to return to their properties and some testified that they came back to Lagos to find that, not only was their property preserved for them but that their friends had continued to collect rents and had kept those rents [for them].⁶⁵

Still, there were concerns in some cases stemming from government appropriation of the landed properties of the Ibos who had fled to Biafra. Such landed properties (residential and commercial buildings) had been declared ‘abandoned’ and were not handed back to the owners even when they returned to claim them. The situation was particularly acute in the city of Port Harcourt which became the capital of the Rivers State, in Nigeria’s ‘South-South’ region.⁶⁶ This issue is a one of the major contributors to a strong sense of marginalisation in ‘popular political discourse’ among the Ibos in post-civil war Nigeria.⁶⁷ Tamuno has noted that the challenges that arose with regard to the restoration of properties to their former Ibo owners in Port Harcourt was due to both

⁶⁴ Daniel Jordan Brown ‘Corruption Complaints, Inequality and Ethnic Grievances in Post-Biafra Nigeria’ (2014) 35 (5) *Third World Quarterly* 787-802, 791

⁶⁵ Interview with Ayo Obe a senior legal practitioner; former chair of the Transition Monitoring Group (an election-monitoring and democracy-building coalition of independent Nigerian NGOs); Trustee, International Crisis Group; former President of the Civil Liberties Organisation, Lagos, Nigeria, 05 May 2017.

⁶⁶ See in this respect the Rivers State Abandoned Property Edict, 1969.

⁶⁷ Brown 2014, 788.

pre-war resentment and post-war political changes and administrative complications in the area⁶⁸

Timely resolution of the abandoned property dispute by the interested parties was however marred by the problem of accurate documentation of such property and by the earlier misleading references to Port Harcourt as an “Ibo town.”⁶⁹

Apparently, the circumstance of the war in which indigenous communities - those deemed to be native to the place as against those considered as settlers⁷⁰ - in Port Harcourt and the wider Niger Delta region supported the federal side provided opportunity for affirmation of their ownership of Port Harcourt which had being declared the capital city of the new Rivers State created by the federal government just before the out-break of the war.

Legal Framework and Political Economy under Military Rule 1970-1999

Successive military regimes followed the path of colonial legislation to impose their rule in a manner similar to colonial rule. Following colonial tradition, the first piece of legislation handed down by the military government that came into power in 1966 not only proscribed the Parliament,⁷¹ it also contained the provision that the Federal Military Government ‘shall have power to make laws for the peace, order and good

⁶⁸ Tekena N. Tamuno ‘Patriotism and Statism in the Rivers State, Nigeria’ (1972) 71 (284) *African Affairs* 264-281, 274-279.

⁶⁹ Tamuno 1972, 281.

⁷⁰ The indigene-settler binary is a major source of conflict in the country and is intertwined with citizenship. While the latter is defined in the constitution, the latter is not but various states and the political elite use employ the binary for various purposes that generates tension since they relate to inclusion and exclusion for certain purposes, including sometimes, social services, cultural and economic rights. See for instance Jibrin Ibrahim (ed) *Citizenship and Indigeneity Conflicts in Nigeria* (IPCR, OSIWA and CDD 2012) available at: <http://cddwestafrica.org/conflict/> (accessed 18 December 2017).

⁷¹ Decree No.1 of 1966. The military named federal and state legislation Decree and Edict respectively.

government of Nigeria or any part on any matter whatsoever.’⁷² The purpose of all such laws was to make military legislation superior to constitutional rules. Such laws either prohibited courts from questioning the legality of military actions or limited their ability to do so. The colonial government had made ‘received English law’ a source of law in the Nigerian legal system.⁷³ In England (and more broadly, the United Kingdom) law reforms have been undertaken to keep the criminal justice system in step with contemporary reality. Thus, some of the laws referred to as ‘statutes of general application’ have been amended or repealed in view of the various developments in the nature of crimes, technological advancements and current experience. However, this has not been the case in Nigeria. The continuing application of such rules in Nigeria, without substantive amendments, despite changing contemporary realities has a negative impact on the effective and speedy disposal of criminal cases.

Two among a number of important disturbing features of the legal and statutory framework of governance in Nigeria’s political transition linked to the colonial past are highlighted by *Gani Fawehinmi, Justice Chukwudifu Oputa (Rtd.) and Human Rights Violations Investigation Commission v General Ibrahim Babangida, Brigadier Halilu Akilu and Brigadier Kunle Togun (the Oputa Panel Case)*.⁷⁴ First is the continued extensive reliance on autocratic legislation by all branches of government deriving from the colonial past and authoritarian military rule. Deriving from this state of affairs, an elected transition government placed reliance on the Tribunals of Inquiry Act (TIA), a pre-republican legislation, to set up a truth commission by executive action rather than

⁷² Section 3 of the Decree. Similar provisions are contained in Section 2 (1) of the Constitution (Suspension and Modification) Decree No.1 of 1983.

⁷³ Obilade (1990) 64-89.

⁷⁴ [2003] M.J.S.C 63 to which we return later. For an extensive consideration of the case, see Hakeem O. Yusuf ‘The Judiciary and Constitutionalism in Transition – A Critique’ (2007a) 7 (3) *Global Jurist* 1.

custom-made legislation. This was at a time when the latter approach had become standard practice elsewhere as was in Ghana and South Africa for instance. The approach arguably makes for democratic participation in the articulation of the terms of reference, powers, and procedures of the truth-telling mechanism.. It is relevant to observe that the legal framework for truth-telling remained unchanged in the country though there is now consciousness on the undesirability of the situation, positive action to rectify it remains marginal. Thus the anomaly has continued with truth processes that have been initiated in the country.⁷⁵ Second is the conventional, uncritical judicial observance of precedents based on principles of the common law imported into the country as part of the colonial legal system. This is reflected in the extensive reliance by the Supreme Court on the case of *Sir Abubakar Tafawa Balewa & Others v Doherty & Others (Balewa v Doherty)*⁷⁶ in the *Oputa Panel Case*. In *Balewa v Doherty* the Federal Supreme Court as well as the Privy Council upheld objections to the powers and the jurisdictional scope of the Commissions of Enquiry Act, 1961, which had similar provisions to the TIA. The Supreme Court rather adopted a plain-fact approach to which it was no doubt accustomed and thereby hit at the root of the transitional context and implicitly at the least, undermined the rule of law. However, as it has been correctly pointed out, the issue in the case had to do with banking matters and ought to have been distinguished in the *Oputa case* not the least because of the circumstances of transition and the international human rights obligations of the country.⁷⁷

⁷⁵ Principally at the state level like those in Rivers and Osun States.

⁷⁶ (1963) 1 WLR 949

⁷⁷ Yusuf (2007a) 84; for an evaluation of the earlier decision of the Court of Appeal to the same effect see, P. Ehi Oshio 'The Constitutionality and Powers of the Human Rights Violations Investigation Commission (Oputa Panel)' (2001/2002) 7 (1) *University of Benin Law Journal* 116-135.

Moreover, as recent as 2015, then Chief Justice of the Nigeria, Justice Mahmud Mohammed lamented, laws regulating the criminal justice system were obsolete. Canvassing the need for reform, he stated that:

We face prolonged delays in the trial of criminal cases leading to an increase in detainees awaiting trial and the congestion of the prisons... The situation is made more precarious due to the archaic and obsolete nature of the laws regulating the criminal justice system.⁷⁸

A vital step in addressing the challenges was the eventual passage of the Administration of Criminal Justice Act (ACJA) 2015.⁷⁹ The same issues still bedevil the evidence laws of the country leading to problems in the admission of electronic evidence in civil and criminal cases. In similar vein, the Police Act remained as enacted in 1943 with outdated punishment for some offences and gender-based discriminatory age requirements for employment.

The country's 37.9 billion barrels of proven reserves places it at the vantage position of being the largest producer of oil in Africa and tenth largest in the world.⁸⁰ The over-dependence on oil paved the way for environmental degradation, communal tensions in the host communities (caused by disruptions to economic activities centred on farming and fishing), conflict and violations of human rights in the Niger Delta. The record of violations of human rights is more extensive than the foregoing highlights and is discussed in further detail through an examination of the work of the truth-seeking mechanism established soon after political transition to civil rule.

⁷⁸ Ikechukwu Inochiri 'Laws Regulating Criminal Trials in Nigeria Archaic – CJN' *Vanguard Newspaper* (23 March 2015) available at: <http://www.vanguardngr.com/2015/03/laws-regulating-criminal-trials-in-nigeria-archaic-cjn/> (accessed 14 March 2017).

⁷⁹ The ACJA is aimed at promoting the 'efficient management of criminal justice institutions, speedy dispensation of justice, protection of the society from crimes and protection of the rights and interests of the suspect, the defendant and victims'. However, due both to its recent passage and the slow pace of adaptation to its provisions by the judiciary and criminal justice agencies, it is yet to make significant impact in criminal justice administration in the country.

⁸⁰ 'Worldwide Look at Reserves and Production' *Oil & Gas Journal* (January 1, 2015).

The control of natural resources and the issue dates back to the colonial period. The Minerals Act of 1946 vested control of all minerals in the country on the colonial government.⁸¹ The Federal Government stepped into the colonial shoes at independence but the 'derivation principle'⁸² mitigated federal control because it provided that 50% of all revenues from the minerals be remitted to the regions of origin. In addition, the three regions also shared 30% of the derived revenue equally.⁸³ However, the post-independence promulgation of several decrees by successive military regimes further effectively expropriated the control of natural resources for the federal government.⁸⁴ The absence of consultation with relevant stakeholders led to various groups, usually ethnic-based, taking up arms against the centre and military rule.⁸⁵

The military regimes perfected plunder, compromised all institutions of state and generally directed them towards flagrant violations of human rights of the people.⁸⁶ The population suffered repression, state-sponsored murder, restrictions on civil liberties and other forms of human rights violations which were disclosed at the public and private hearings of the Oputa Panel.⁸⁷ There was widespread use of lethal force by

⁸¹ The 1946 Minerals Act was re-enacted as the Minerals and Mining Decree (1999) and now styled Act No 34. It provides that the 'entire property in and control of all minerals, in, under or upon any land in Nigeria, its contiguous continental shelf and of all rivers, streams and watercourses throughout Nigeria, any area covered by territorial waters or constituency, the Exclusively Economic Zone is and shall be vested in the Government of the Federation for and on behalf of the people of Nigeria.'

⁸² Introduced in 1946 as part of the federal arrangement during the colonial period.

⁸³ International Crisis Group *Nigeria's Faltering Federal Experiment* Crisis Group Africa Report N°119, (October 2006) 1, 4.

⁸⁴ These are notably the 1971 Offshore Oil Revenues Decree; 1971 Territorial Waters (Amendment) Decree; 1970 Petroleum Profits Tax (Amendment) Decree; 1969 Oil Terminal Dues Decree, the 1978 Land Use Decree; the 1969 and 1991 Petroleum Decrees; the 1993 Lands (Title Vesting etc.) Decree (Osborne Land Decree), the 1997 National Inland Waterways Authority Decree (as variously amended); among others.

⁸⁵ Sola Akinrinade 'Constitutionalism and the Resolution of Conflicts in Nigeria' 92 (368) *The Round Table* 40 (-52), 42-44 (2003).

⁸⁶ *Synoptic Overview* (2004).

⁸⁷ Discussed below

security agents and the police against the civilian populace. For instance between 1966 and 1993, over two hundred military officers and civilians were brought before military tribunals on charges related to at least seven instances of actual or alleged coup plots were convicted and sentenced to death while some were jailed.⁸⁸ This was particularly rife during the Babangida and Abacha military regimes of 1985-1993 and 1993-1998 respectively with the latter regime in particular gaining notoriety for alleging phantom coups against serving and retired military officers as well as some civilian members of society it perceived as opposition elements.⁸⁹

Special Military Tribunals (SMTs) were established to try a number of civil offences, including armed robbery, drug trafficking, corruption in public office, and 'economic sabotage.' SMTs were almost invariably chaired by serving senior military officers, and composed mainly of members of the military and security agencies as well as a few civilians. They commonly imposed the death penalty and the convicted were in some instances summarily executed, in breach of their constitutional right of appeal. Cases of public execution in defiance of due process included that of Ogoni Rights activist and renowned author, Kenule Saro-Wiwa and some other members of the Movement for the Survival of the Ogoni People (MOSOP) referred to as the 'Ogoni nine'⁹⁰ in November 1995.⁹¹ Others were sentenced to very long terms of imprisonment. Political transition

⁸⁸ For a discussion of the various coups and the military tribunal set up to try the suspects, see Emmanuel O. Ojo 'Guarding the "Guardians" A Prognosis of Panacea for Evolving Stable Civil-Military Relations in Nigeria' (2009) 35 (4) *Armed Forces & Society* 688-708.

⁸⁹ See for instance Bayo Akinloye 'Some Generals Wanted to Blow up Plane Carrying Obasanjo, Others — Col. Oloruntoba' *Punch* (Lagos 16 April 2017); Peter M. Lewis 'End Game in Nigeria?: The Politics of a Failed Democratic Transition' (1994) 93 (372) *African Affairs* 323, 330; Bayo Akinloye 'Bamaiyi is An Evil Liar, He Tortured MKO before His Death — Col. Ajayi' *Punch* (Lagos 9 April 2017); Bayo Akinloye 'Obasanjo is Not Example of a Good Leader — Cmdr Omessa' *Punch* (Lagos 23 April 2017).

⁹⁰ For a more detailed account of the judicial murder of the Ken Saro-Wiwa and some members of the Movement for the Survival of the Ogoni People (MOSOP) see A Maja-Pearce *From Khaki to Agbada: A Handbook for the February 1999 Elections in Nigeria* (Civil Liberties Organisation Lagos 1999) 12-17.

⁹¹ This was for alleged involvement in the killing of four senior Ogoni chiefs.

in Nigeria was largely brought about by the sudden death of the country's military leader, General Sanni Abacha in June 1998. He was succeeded by General Abdusalami Abubakar.

POLITICAL TRANSITION AND TRANSITIONAL JUSTICE

General Abubakar was unequivocal in his resolve to deliver a prompt transition to democratic governance in the country which he accomplished in less than a year in office, with his military government handing over power to an elected administration on 29 May 1999. General Abubakar was acutely aware of the high-level of domestic and international opposition to continued military rule in the country and the democratisation wave that was taking hold in former authoritarian societies across African, Eastern Europe and Latin America in the late 1980s and the 1990s.⁹² The handover marked the end years of authoritarian military rule and several aborted cycles of expensive political transition programmes to democratic rule.⁹³ Chief Olusegun Obasanjo, a retired general and former head of state emerged as President. The election of Chief Obasanjo was accepted internationally, though largely criticized at home as it was felt that he was a candidate of the old-guard in the military. Notwithstanding the circumstance of the political transition programme, there was the recognition across the polity for a need to implement transitional justice measures to deal with issues of gross violations of human rights. Thus, at the dawn of its transition to civil rule, the Federal Government of Nigeria attempted to engage with the past.

⁹² Lewis 1994, 43.

⁹³ The most prominent of these was the political transition programme aborted by self-styled 'military President' General Ibrahim Babangida in 1992 following the historic election victory of Chief Moshood Abiola at the presidential elections. See Lewis, 1994, 43.

The discussion in this section examines the rather limited transitional justice measures initiated by General Abubakar; namely legal reforms, trials and lustration processes before analysing the truth-seeking process which was the main mechanism that was instituted for dealing with the past. The analyses then turn to the formation, mandate and legislation of the Oputa Panel and its work. Special attention is paid to the petition on the murder of Dele Giwa, a frontline investigative journalist. This petition resonated during the life of the Oputa Panel and the litigation that arose from it played a central role in the non-release and non-implementation of its recommendations. Finally, the analyses shift to the problems that challenged the work of the Oputa Panel as well as the aftermath of the process. However, before proceeding with the analyses as set out, a relevant starting point is to examine the role of civil society in the political transition process.

Civil Society and Politics of a Non-Negotiated Democratic Transition

The context of an elite-driven democratic transition accounts at least in part for the subsequent absence of a transitional justice agenda or at best, an uncoordinated approach to securing justice for the victims of gross violations of human rights during the period of military rule in the country. One important consequence has been how it limited the opportunities for civil society to set an agenda for the transition including an engagement with the impact of colonial rule.

It is important to note that the military either intimidated or compromised and factionalised civil society groups (CSGs) during the authoritarian period. The military governments, especially under the Babangida and Abacha military regimes in the late 1980s to the mid-1990s were particularly notorious in this regard. The military regimes adopted a carrot and stick approach in its dealings with CSGs to divide them and

weaken their capacity to mobilise public opinion and action against them especially in the context of various failed promised political transition programmes and bad governance. Among others, the military particularly targeted higher and tertiary education students' associations (like the National Association of Nigerian Students); professional associations of journalists (like the Guild of Editors and the National Union of Journalists, National Association of Women Journalists); the Nigeria Bar Association (NBA); Nigerian Medical Association; university staff unions (Academic Staff Union of Universities; Non-Academic Staff Union); labour unions (like the Nigeria Labour Congress); market women associations, and even socio-cultural associations. One approach was to infiltrate the leadership of such groups to compromise them, and where this was not possible, to harass and intimidate them through unlawful arrests, detention, dismissals and in some cases, extra-judicial murder. The former tactic was evident in various attempts by the military to co-opt the leadership of the NBA including appointing successive presidents as Minister of Justice and Attorney-General. The latter approach was adopted by the military regimes in the Ken Saro and MOSOP case mentioned above as well the arrests, detention and sometimes, disappearance and murder of fearless journalists like Bagauda Kaltho and Chinedu Offoaro with the most notorious being the letter-bomb murder of Dele Giwa.⁹⁴

Further, transitional justice in Nigeria was also negatively impacted by the scepticism that had developed around the political transition programme. This facilitated the entrenchment of the military old guard in power. It is essential to understand in this regard that by the time General Abubakar initiated his political transition to civil rule programme, civil society groups no longer trusted the military to hand over power to a

⁹⁴ Discussed below.

democratic government. As Richard Akinnola, a founding member of the Civil Liberties Organisation (CLO),⁹⁵ pointed out, '[General] Abdusalami [Abubakar] came up with his transition programme but because of previous experience under [General] Abacha, it was difficult to trust them (the military).' ⁹⁶ Consequently, the Joint Action Committee for Nigerians (JACON) which was an umbrella for civil society groups decided to boycott the transition programme to avoid being 'fooled again'.⁹⁷ Elections into the national legislature and the Presidential elections had over 40 percent and 52 percent of registered voters' turn-out respectively.⁹⁸

With the benefit of hindsight, the non-engagement of civil society groups with the political transition programme was 'a fundamental mistake'.⁹⁹ It meant that civil society groups left the political space to those who were not interested in justice for victims of gross violation of human rights. As one civil society leader observed

All we wanted was to create an enabling environment for democracy, constitutionalism, rule of law and democracy to germinate. It has been found to have been very incorrect and wrong for us to have done that without actually thinking about power. Perhaps if civil society had thought about having a broad political power and implement all those things that they fought for, it would have been better...Power was on the streets and it was grabbed by those who were wielding power at that time in concert with the political arm most of whom were opportunists.¹⁰⁰

Reflecting on the impact of public weariness to the endless transition programmes initiated by successive military regimes, Abiola Akiyode-Afolabi, chair of the Transition Monitoring Group (TMG)¹⁰¹ similarly pointed out that at the time

⁹⁵ The foremost human rights organisation in the country.

⁹⁶ Interview with Richard Akinnola (human rights activist, journalist and author), Lagos, Nigeria, 5 April, 2017.

⁹⁷ Interview with Richard Akinnola 2017.

⁹⁸ 'Election Guide: Democracy Assistance and Election News- Federal Republic of Nigeria' <http://www.electionguide.org/countries/id/158/> accessed (02 December 2017).

⁹⁹ Interview with Richard Akinnola 2017.

¹⁰⁰ Interview with Nurudeen Ogbara 2017.

¹⁰¹ Nigeria's foremost election observation group, coalition of 400 civil society organisations involved in monitoring the political transition process and in particular, election monitoring.

Human rights activists did not care what party came into power...people just wanted the military out. The political transition that took place in 1999 was like from military to military, but in civilian clothes.¹⁰²

The ensuing gap provided opportunity for the conservative political elite that emerged to entrench themselves in power. They consciously made it virtually impossible for those with an alternative political agenda which could challenge the status quo of unaccountability, to secure a foothold in the democratic space.

Initial Transitional Justice Measures – Legal ‘Reforms’, Trials and Lustration

The first steps toward transitional justice were actually taken by the last military regime led by General Abubakar perhaps to advance the acceptability of his government particularly when the country had reached the lowest point of its pariah status internationally. As an important part of the transition process, the military government of General Abubakar implemented limited legal ‘reforms’. General Abubakar repealed a number of military decrees (around fourteen of them) a few of which were political transition-related legislation. Most of the affected decrees were draconian legislation that limited the operation of the Constitution and or, curtailed various civil and political rights. They included decrees suspending or subordinating parts of the Constitution, prescribing military supremacy legislation (referred to earlier), establishing special military tribunals, ‘civil disturbances’ offences, state security and detention of persons and establishing military courts and tribunals for civil offences. Others were decrees proscribing some media organisations and prescribing treasonable offences.¹⁰³

¹⁰² Interview with Dr Abiola Akiyode-Afolabi (transitional justice expert and human rights activist) 6 April 2017, Lagos, Nigeria.

¹⁰³ See Constitution of the Federal Republic of Nigeria (Certain Consequential Repeals) Decree No. 63 of 1999, Laws of the Federation of Nigeria

The Abubakar administration also promulgated a 'new' Constitution for the country.¹⁰⁴ This introduced some changes like the establishment of the National Judicial Council which was composed largely of the leadership of the judiciary at the federal and state levels (all of whom had been appointed during the military era) along with few senior lawyers, for the appointment and discipline of judges and the Council of State to advise the President whenever requested to do so on the maintenance of public order in the country.¹⁰⁵ However, the democratic legitimacy of that Constitution remains a major issue. It was essentially a product of a closed process undertaken by a few selected individuals appointed by General Abubakar. The panel worked without any serious attempt at public consultation. Indeed, the product was essentially a revamping of the 1979 Constitution with some amendments. The Constitution was approved by the Provisional Ruling Council headed by General Abubakar.¹⁰⁶ It was promulgated into law by a military decree in the circumstance that it was not made by a democratic process. It thus left unaddressed, many issues that agitated the minds of various groups and interests in the country. The non-participatory process instituted for constitution-making further fuelled distrust of the civil society groups in the political transition process.¹⁰⁷

The legitimacy question remains a major issue with Nigerian constitutions past and present. As stated in the Report of the 2014 National Conference, from the colonial period till date, the country has only been saddled with 'false constitutions' by the colonial administrators (before independence) and the military (post-independence):

¹⁰⁴ Decree 24 of 1999 containing the current 1999 Constitution of the Federal Republic of Nigeria.

¹⁰⁵ Section 15, 1999 Constitution of the Federal Republic of Nigeria.

¹⁰⁶ Human Rights Watch 'Nigeria- Human Rights Developments' (1990) available at <https://www.hrw.org/legacy/wr2k/Africa-07.htm> (accessed 03 May 2017).

¹⁰⁷ Interview with Richard Akinnola 2017.

a truly acceptable constitution has not emerged to mediate the social contract between the constituent nationalities of the country and the Nigerian state... successive constitutions have...been vitiated by the absence of that critical organic connection which they are supposed to have had with the spirit of the people in order to give meaning to their cry of 'We the People...'¹⁰⁸

The Abubakar regime also commenced the prosecution of a handful of notorious military and security operatives of the penultimate military regime. About fifteen notorious members of the Abacha regime, alleged to have played prominent roles in state sponsored killings and violence, were arraigned for various serious offences ranging from murder and kidnapping, embezzlement of public funds, to arson. Some of those arrested and charged included Abacha's son, Mohammed, his National Security Adviser, a former chief of army staff, chief security officer of the former head of state, his chief police detail, his former chief security adviser, and a former military administrator of one of the States in the country. These individuals formed part of a group deemed to be particularly powerful and capable of threatening the new administration. While some of the trials became moribund due to the absence of political will to proceed, many others have (except three)¹⁰⁹ not been concluded.

The delay in the trial process of cases forming part of the transitional justice measures is due largely to the exploitation of a very weak criminal justice system which remains largely unreformed since the colonial era discussed earlier. Defence counsels -

¹⁰⁸ *National Conference 2014: Final Draft of Conference Report* (14 August 2014) 51 available at: <http://www.premiumtimesng.com/national-conference/download-nigeria-2014-national-conference-report-ngconfab-2/>

¹⁰⁹ The Former Chief of Army Staff was charged with attempted murder of the publisher of a leading newspaper and was discharged and acquitted after eight years of trial on 2nd April 2008. The son of General Abacha was charged with conspiracy to commit murder of a wife of the winner of the 1993 Presidential elections in one of the country's aborted political transition programmes. He was ordered released by the Supreme Court on a 'no-case' submission in what was viewed as a politically influenced decision by the Obasanjo regime. The Chief Security Officer was convicted of murder but was acquitted on appeal. A final appeal to the Supreme Court is pending.

especially experienced senior lawyers - often exploit the state of the law to frustrate the speedy disposal of criminal proceedings in the name of fair hearing. A practice of raising all sorts of objections to the trial, and where that fails, alleging bias against the trial-judge has developed in the country. This practice was exploited in virtually unprecedented fashion in the line of cases involving former members of General Abacha's regime mentioned earlier. The practice also involved appealing virtually every interlocutory issue or objection all the way to the Supreme Court and insisting on a 'stay of proceedings' (suspending the trial) while awaiting the appeal decision. Once the issue on appeal is decided, new applications are made (sometimes by another defendant on the same issue) and a vicious circle of long-standing trials is maintained.

The situation was compounded by the approach of the judges whose view of the demands of the common law tradition of adjudication was that of a rather distant umpire whose role was to hear and determine all applications (even where such is an evident abuse of the judicial process). In practice, most trial judges hardly maintained a control of their courts and this facilitated abuse of process and inordinate delay by defence counsels in the name of legitimate defence of clients. In one instance, after frustrating continuation of his trial for more than seven years through such a process, the accused brought an application to challenge the delay he had orchestrated as an injustice.¹¹⁰ Meanwhile, the accused persons in their bid to secure reprieve at all costs, were alleging persecution and appealing to ethnic and religious sentiments in the media.

The transitional justice-related trials, more than any other criminal trials in the country's history, brought to the fore the need to reform the criminal justice system as

¹¹⁰ The author was part of the prosecution team in these cases from 2000-2006.

pointed out earlier. The foregoing state of affairs in the judiciary calls further attention to the institutional heritage of the judiciary from its colonial founding. To the average citizen, the judiciary, to a large extent, constitutes one of the most prominent symbols of a colonial heritage. It is usually considered as being at some remove from the regular day-to-day activities of ordinary people. Even in the post-authoritarian period in Nigeria, the courts continue to suffer from a serious 'social legitimacy' deficit, enjoying recognition within a much circumscribed segment of society.¹¹¹ The public trust in the judiciary as an institution for securing rights and abating impunity is understandably low in the circumstances.

Whatever might have been the weaknesses of the criminal justice system, it is important to bear in mind that the initial move by the Abubakar regime to even prosecute the few individuals for violations of human rights was half-hearted at best. The move was conditioned by the reality of the precarious balance of power in the short life of that 'transitional regime' itself. From a pragmatic point of view, the fact was also not lost on him that the minions of his predecessor remained in the corridors of power and they could attempt to topple his regime through a coup if the opportunity presented itself.

Another feature of the Abubakar regime was the symbolic lustration of about two hundred politically exposed military officers from active service. These officers had held political appointments as governors or administrators of the various States, cabinet ministers and chairmen of key state agencies, public corporations and similar government institutions. Many of them had been corrupt and accumulated fabulous wealth well beyond their legitimate earnings. The experience had made holding political

¹¹¹ H Kwasi Prempeh 'Marbury in Africa: Judicial Review and the Challenge of Constitutionalism in Contemporary Africa' (2006) 80 *Tulane Law Review* 1239, 1301.

office, rather than military service for which they were engaged, very attractive and one of the major incentives for coup-plotting.

The lustration of those considered as politically exposed military officers was also carried out by Chief Obasanjo soon after he came to power in 1999. He purged 93 top military officers from the armed forces.¹¹² Those affected were generally in the same category as those earlier disengaged by General Abubakar. It was felt that such military officers were a threat to the country's 'budding democracy'.¹¹³ According to Chief Obasanjo, the disengagement of such military officers was a critical step for securing professionalism of the country's military and correcting the aberration of their holding political office in the first place.¹¹⁴ Thus, the lustration process was directed at protecting the new civil regime rather than at ensuring institutional reform and riding the military of violators of human rights.

The circumstances of the judiciary, trials and limited application of lustration highlighted above, raise wider issues of institutional legacies from the colonial experience. There are issues that could be considered in this regard across the spectrum of government institutions like the civil service, the security agencies; the military and intelligence services, the police and so on at the point of independence. There was generally no recourse to what would today be regarded as transitional justice measures or processes. There were no trials for human rights violations just as there was no record of the use of lustration at the time.

¹¹² Olugbenga Adanikin and Ibrahim Azeez 'Why I Sacked 93 Top Military Officers in 1999 – Obasanjo' *The Nation* (Lagos 16 July 2017) <http://thenationonline.net/obasanjo-purged-army-1999/> (accessed 16 July 2017).

¹¹³ Idris Ibrahim 'I Have No Regret Retiring Politically Exposed Military Officers – Obasanjo' *Premium Times* (05 July 2017 Abuja) <http://www.premiumtimesng.com/news/top-news/235897-i-no-regret-retiring-politically-exposed-military-officers-obasanjo.html> (accessed 05 July 2017).

¹¹⁴ Ibrahim 2017.

There are a number of possible explanations for the absence of transitional justice measures at independence. First, despite the Nuremberg precedent, transitional justice had not yet assumed the prominence it now has. Second, there is the reality that the international system has constituted the major catalyst in the adoption and implementation of transitional justice processes across the world. The international system was very much under the control and direction of countries that were also colonial powers at the time. There was understandably no appetite among the relevant players to subject their governments and institutions to accountability for the colonial enterprise. Another explanation could be that the absence of an armed struggle for independence in Nigeria made the imperative of transitional justice measures less pressing, even if arguably relevant. There was no experience of gross and widespread violations of human rights of individuals and groups involved in the independence movement. The campaign for independence was conducted essentially peacefully through the local press, political parties and trade unions. There was no mass liberation movement or struggle that involved widespread violence in Nigeria, unlike the experience in a country like Kenya with its Kenya Land and Freedom Army (KLFA).¹¹⁵

Moreover, as stated earlier, Nigeria remained a part of the British realm with Queen Elizabeth II as Head of State for another three years after independence. In the circumstance, most institutions of government, including the police and the armed forces, the judiciary and the civil service were either still headed by British officials or had British officials in very senior positions until at least 1963 when Nigeria became a republic. In addition, the British had also made clear that they intended to continue to do business with Nigeria, ostensibly to the mutual benefit of both countries. Indeed, as

¹¹⁵ This came to be known as the 'Mau Mau' Movement.

one commentator has observed, the British (and the French) had ensured independence for its territories like Nigeria was organised to put in place 'constitutional transfers of power to ideologically friendly, moderate political parties which would broadly align themselves with the interests of the former colonial power.'¹¹⁶ This approach meant that those who took over from the departing colonial power were allowed into such succession only after it was fairly certain they would not be interested in instituting justice for past abuses.

In any event, even left to their devices, the elite, as stated above were, and remain keen to take over the privileges enjoyed by the departing British colonialists. That objective severely relegated the significance of conducting an inquiry into securing justice for the victims of gross violations of human rights resulting from colonial rule or reforming state institutions for post-colonial governance. Put another way, the interests of the political elite made the prospect of transitional justice plainly unattractive, and even if it was attractive, the mechanisms by which it would be implemented were severely compromised by the structures established under colonisation.

The post-colonial precedent established a culture of condoning impunity of those who have held power. Arguably, that legacy, at least to a reasonable extent, created an atmosphere in which there is little appetite for a sustained engagement with transitional justice even after the period of military rule. Rather, as Nurudeen Ogbara noted

When the politicians also took over, they also became politicians in uniform and therefore continued with the military tendencies of doing things against the rule of law

¹¹⁶ Richard Reid 'Horror, Hubris and Humanity: The International Engagement with Africa, 1914-2014' (2014) 90 (1) *International Affairs* 143, 153-154.

and due process...The civilians elected also began to do things like the military. They became antagonistic to the rule of law, constitutionalism and democracy.¹¹⁷

Nevertheless, as stated earlier, the truth-telling process is the most important transitional justice mechanism adopted in the post-authoritarian/military era in Nigeria, and it will be considered below.

The Truth-Seeking Process: Oputa Panel, 29 June 1999-28 May 2002

Formation and Mandate

During his political campaign for the presidency, Chief Obasanjo had spoken about the need to address gross violations of human rights, secure justice for victims and as well as the need to 'heal the nation'. His inaugural address to the country also made direct reference to these issues. He commended 'home-based fellow Nigerians' for their fortitude in bearing 'unprecedented hardship, deprivation of every conceivable rights and privileges that were once taken for granted.'¹¹⁸ Ostensibly to demonstrate his commitment to transitional justice as stated during his candidacy, President Obasanjo established the Oputa Panel on 14 June 2009, barely two weeks after his inauguration in 1999. It submitted its report to the Obasanjo administration on 28 May 2002.

At the inauguration, President Obasanjo declared that it was established to demonstrate his administration's 'determination to heal the wounds of the past... for complete reconciliation based on truth and knowledge of the truth in our land.'¹¹⁹ He went on to declare that the government will do 'everything possible to address all issues that tend

¹¹⁷ Interview with Nurudeen Ogbara 2017.

¹¹⁸ Nigeria World 'Inaugural Speech by His Excellency, President Olusegun Obasanjo following his Swearing-in as President of the Federal Republic of Nigeria on May 29, 1999'.

¹¹⁹ 'Address by His Excellency the President, Commander-In-Chief of the Armed Forces, Chief Olusegun Obasanjo, G.C.F.R at the Inauguration Ceremony of the Human Rights Violations Investigations Panel on Monday 14 June 1999'.

to bring our country into dispute, or perpetuate injustice, conflict and the violation of human rights.’

The Oputa Panel was established by Statutory Instrument No.8 of 1999¹²⁰ under the hand of President Obasanjo. The statutory instrument was made pursuant to Tribunals of Inquiry Act (TIA).¹²¹ The Oputa Panel’s mandate as amended was to:

- a) ascertain or establish the causes, nature and extent of all gross violations of human rights committed in Nigeria between the 15th day of January 1966 and the 28th day of May 1996;
- b) identify the person or persons, authorities institutions or organisations which may be held accountable for such gross violations of human rights and determine the motives for the violations or abuses, the victims and circumstances thereof and the effect on such victims and the society generally;
- c) determine whether such abuses or violations were the product of deliberate state policy or the policy of any of its organs or institutions or whether they arose from abuses by state officials of their office or whether they were the acts of any political organisation, liberation movement or other groups or individuals;
- d) recommend measures which may be taken whether judicial, administrative, legislative or institutional to redress past injustices and to prevent or forestall future violations or abuses of human rights;
- e) make any other recommendations which are, in the opinion of the Judicial Commission, in the public interest and are necessitated by the evidence;

¹²⁰ As amended by Statutory Instrument No.13 of 1999.

¹²¹ No. 447, Laws of the Federation of Nigeria, 1990.

f) receive any legitimate financial or other assistance from whatever source which may aid and facilitate the realisation of its objectives.¹²²

The Oputa Panel's remit did not include consideration of the colonial period. In fact, it was initially empowered to examine only violations of human rights committed during the period from 1 October 1979 (when the incumbent president had handed over to a democratic government) to May 28 1999 (when he remerged as an elected President).

The initial mandate was viewed as limited and was strongly criticised by the human rights community, politicians and the public at large for a number of reasons. These included the fact the mandate did not cover the period of the civil war and it also excluded several periods of military rule including when the new President was also in power as military Head of State. Sensing the legitimacy crisis the process will have and anxious to be seen as delivering on his commitment to addressing the past, President Obasanjo approved the extension of the period to be covered by the process. The government later granted Oputa Panel was granted an extended remit that covered the whole of the period of military rule from 15 January 1966 (when the first military coup took place) to 28 May 1999. Further, the request of the Oputa Panel for the amendment to the original terms of reference that restricted its purview to '...all known or suspected cases of mysterious deaths and assassinations' was also granted. The inclusion of paragraphs (e) and (f) above were also at the request of the Oputa Panel. These were with a view to ensuring that it acquired the full-fledged status of a truth and reconciliation commission. The amendments were effective from 4 October 1999.¹²³

¹²² Statutory Instrument No.8 1999 as amended by Statutory Instrument 9 of 1999.

¹²³ *Oputa Panel Report*, Vol. 1 (Chap 1) 28-31.

In its report, the Oputa Panel stated that it took the South Africa Truth and Reconciliation Commission (South Africa TRC) as its model¹²⁴ but in practice, there were fundamental differences in their structures. The Oputa Panel did not have the specialised units provided for by the law establishing the South African TRC. The Oputa Panel was not designed for the rehabilitation of victims and it was not granted the power of amnesty for truth. However, a notable feature it did share with the South Africa TRC is the 'naming' of alleged perpetrators of gross violations of human rights. Nonetheless, one important feature of the TIA is that it gave the Oputa Panel coercive powers to *subpoena* witnesses and documents. The Oputa Panel also had powers to order the arrest of any individual it determined was, or had acted in contempt of the Panel. These powers, as will be discussed below, led to contentious litigation against the Oputa Panel by former military rulers wary of the accountability process.

Oputa Panel and the Interpretation of its Mandate

The Oputa Panel viewed its status as a truth and reconciliation commission. Indeed, while addressing the issue of reparation and compensation for victims, it expressly referred to itself as a 'truth commission.'¹²⁵ It is to be expected that the mandate of any commission will be pursued in accordance with the perception or interpretation of the mandate by the members. The Oputa Panel viewed its key mandate as achieving reconciliation. In the words of the Chairman, '*Our quo warrant is the search for this reconciliation.*'¹²⁶

¹²⁴ *Oputa Panel Report* Vol. 1 Chapter 1, 34.

¹²⁵ *Oputa Panel Report*, Volume 6, Chapter 1, 1.

¹²⁶ *Synoptic Overview Oputa Panel Report* (2004) 8.

Perhaps as a result of the emphasis on reconciliation, the Oputa Panel never invoked its power to order the arrest of any witnesses. The Oputa Panel maintained this position even when faced with the defiance of three past military rulers and some of their security chiefs to attend on its summons, a development that tested the will, if not the credibility of the Oputa Panel in the public eye. It may be the case that the Oputa Panel was wary of the power dynamics in the country. There was the reality that President Obasanjo was not only known to have been the choice of the military, he also has some retired former senior military officers in his cabinet at the time (199-2003) holding sensitive positions in the government.¹²⁷ Notwithstanding Oputa Panel's emphasis on *reconciliation*, its terms of reference clearly required it to play a pivotal role in achieving truth and accountability for victims of gross human rights violations during the decades of military authoritarian rule. This aspect of its mandate, in spite of its reconciliation approach was not lost on the Oputa Panel as reflected in the summary of its report.¹²⁸

The Oputa panel was expected to suggest measures for deterrence of future violations and foster restoration of the rule of law which had been violently displaced during the years of military dictatorship. This can be discerned from the broad terms of reference that mandated the Oputa Panel to 'recommend measures which may be taken whether judicial, administrative, legislative or institutional to redress past injustices and to prevent or forestall future violations or abuses of human rights'. In this way, the framers of the mandate expected the Oputa Panel to recommend further investigations of alleged violations, as well as outright prosecution of alleged perpetrators of criminal violations of human rights. It did both, though more of the former than the latter.

¹²⁷ They held very sensitive cabinet positions like defence, police, state security, and national security adviser.

¹²⁸ Ibid.

Expectations were high that the Oputa Panel would contribute extensively to social reconstruction in Nigeria. This was reflected in the Oputa Panel's mandate which urged it to 'make any other recommendations which are, in the opinion of the Judicial Commission, in the public interest and are necessitated by the evidence.'

The Oputa Panel approached its mandate from a perspective that emphasised a broad and flexible conception of its terms of reference. In pursuit of this perspective, the Oputa Panel's recommendations went beyond investigations of alleged violations of human rights to setting an agenda for transformation of Nigerian society. An analysis of the findings and recommendations of the Panel suggests it was caught between the desire to foster reconciliation -between persecutors and the persecuted - and the desire to achieve justice for victims of impunity, through recommendations of compensation and in some cases, criminal trials.

The Work and Findings of the Oputa Panel

The Oputa Panel received over 10,000 petitions within a few months of its establishment.¹²⁹ This is perhaps evidence of the level of rights violations committed during the period of military rule. It also points to widespread need of victims for a truth-seeking process for securing justice and redress for past human rights abuses. The petitions were largely about murder, assassination, attempted assassination, abduction, torture, harassment and intimidation, prolonged detention (with or without trial), employment related cases as well as contractual and business related cases. However, constrained by factors like limited personnel, time and financial resources, the Oputa Panel decided to hear only 200 petitions at its public hearings. According to the Oputa

¹²⁹ Yusuf (2007) 274.

Panel, the criteria for hearing the chosen petitions were consideration of the nature of the rights involved and the extent or degree of the infringement(s) alleged.¹³⁰ There was thus a great disparity between the petitions submitted to the Oputa Panel and those actually heard in public. Still, it heard testimony from some 2,000 witnesses and received 1,750 exhibits related to these selected cases.¹³¹

Public Hearings: General, Special and Institutional

The public hearings were the platform for ventilation of various violations of human rights and the misuse of state powers in the years of military rule in Nigeria. The public hearings of the Oputa Panel were of two types. There was the general or 'zonal' public hearing which were held in five notable zonal capitals and the Federal Capital Territory, Abuja.¹³² There were also the special or 'institutional' hearings. The sessions of the Oputa Panel were held in public between 24 October 2000 and 9 November 2001.¹³³ There was considerable national coverage of the public hearings by the media. The most popular public and private television stations in the country provided daily coverage of the public hearings shortly after they began. The public hearings generated intense public interest with Nigerians 'glued to their television sets five nights a week, stunned by their country's sordid past dragged before the Commission.'¹³⁴ The press coverage

¹³⁰ *Synoptic Overview Oputa Panel Report* (2004) 41.

¹³¹ Yusuf 2007, 274

¹³² The others were at Lagos, Port Harcourt, Enugu and Kano. Reference to 'zonal capitals' is notional only, as the country has a federal state structure. There were two rounds of public hearings at Abuja, the nation's federal capital territory (FCT).

¹³³ *Oputa Panel Report* Volume 4 Chapter 1, 9

¹³⁴ BBC News: 'Africa Media Watch' (Friday, 3 August, 2001, 11:33 GMT) available at: <http://news.bbc.co.uk/1/hi/world/africa/1470177.stm> (last accessed 24 March 24, 2017).

was acknowledged and strongly commended by the Chairman as a major contributor to the 'successes of the Panel.'¹³⁵

President Obasanjo appeared twice before the Oputa Panel. His first appearance was as a victim. He had been convicted and jailed, along with some serving retired military officers, for a 'phantom coup' in 1995 by the Abacha military regime. He spent three years in prison and narrowly escaped being extra-judicially murdered in custody. Indeed his erstwhile deputy, General Shehu Musa Yar' Adua who was also convicted, had died in custody following a mysterious injection reportedly administered on him.¹³⁶ President Obasanjo was clearly delighted at the opportunity to proclaim his innocence, narrate his experience of persecution and challenge some of his persecutors. Obasanjo's second appearance was in response to the summons of the Oputa Panel. He was required to respond to allegations of human rights violations during his tenure as military Head of State. Some have expressed the view that President Obasanjo did not implement the Oputa Panel report due to that second appearance as it had brought to the fore the prospect of accountability for human rights violations committed during his military regime (1975-1979). Indeed, he left the hearing in anger.¹³⁷ In Obe's view 'as soon as Obasanjo knew that...[his] own [military regime's human rights violations] is inside there as well...not just Sani Abacha, he knew that he was going to kill that thing in the water.'¹³⁸ Notwithstanding his obvious discomfiture on his second appearance, Obasanjo's attendance on that occasion gave impetus to the proceedings of the Oputa Panel.

¹³⁵ *Synoptic Overview Oputa Panel Report* (2004) 16.

¹³⁶ Arukaino Umukoro 'Abacha Injected Yar'Adua with Virus that Killed Him — Obasanjo' *Punch* <http://punchng.com/abacha-injected-yaradua-with-virus-that-killed-him-obasanjo/> (accessed 09 July 2017)

¹³⁷ Interview with Nurudeen Ogbara 2017.

¹³⁸ Interview with Ayo Obe 2017.

Victims of rights violations included the first executive president of the country, Alhaji Shehu Shagari. He was the only former leader of the country that heeded Obasanjo's call for former leaders to appear before the Oputa Panel. He ruled the country between October 1979 and December 1983.¹³⁹ This was likely due to the fact his government, while notorious for corruption, was not particularly noted for gross violations of human rights. The visibility of the Oputa Panel grew with petitions and testimonies of leading lawyers, former political officer holders (who fell in the bad books of the military), and civil society leaders. Others who came before the Oputa Panel included human rights advocates, leaders of workers unions and students, all of whom were active in the opposition to military rule.

According to the Oputa Panel, the causes of human rights violations were neither 'simple' nor 'straightforward.'¹⁴⁰ The violations were allegedly perpetrated by the army, the security agencies and the police.¹⁴¹ There were some instances of corporate or individual violations of rights too.

Paragraphs b and c of the terms of reference of the Oputa Panel provided ample basis for institutional hearings along with public hearings that focused on individual complaints. Thus, there were also 'special' hearings organised for civil society, human rights groups and specialised professional organisations. The special and institutional public hearings featured submissions from the National Human Rights Commission, the Armed Forces, the Police, State Security Service, the Nigeria Prisons, about ten civil society and human rights organisations and a few individuals.¹⁴² The choice of state

¹³⁹Ibid. at 50.

¹⁴⁰ *Synoptic Overview Oputa Panel Report* (2004) 24.

¹⁴¹ Ibid. at 48-49.

¹⁴² Ibid. at 9-10.

institutions, with the notable exception of the National Human Rights Commission, may have been informed by the popular view that they constitute notorious sources of human rights violations. The National Human Rights Commission for its part was set up precisely to monitor human rights implementation in various aspects of national life, ironically by the Abacha junta noted for its record of gross human rights violations.

Nonetheless, it did hold hearings on the Police and the Prisons as part of the criminal justice system. The Oputa Panel's special hearings on the Nigerian Prisons were based on submissions made by the Prisons Service and non-governmental organisations. The major sources and nature of human rights violations in Nigerian Prisons are succinctly articulated in the submission of the Nigerian Prison Service to the Oputa Panel:

...under the conditions of *chronic prison congestion, perennial neglect of the services and delay in justice delivery*, certain basic rights of prisoners are violated. The right to life and integrity of the person, to health and respect for human dignity are largely un-guaranteed.¹⁴³

The Nigeria Prisons Service, like many other civil institutions of the Nigerian society, suffered serious neglect during the period of military rule.

Illegal detention was the order of the day. Suspects awaiting trial not only outnumbered convicts, but many had to wait for over ten years for trial.¹⁴⁴ New prisons were not built for decades. Yet, there was a phenomenal increase in the number of inmates, especially suspects awaiting trial as a result of increased crime rates and delay in the trial of accused persons. Detained persons lacked practically every basic necessity required for day-to-day living.¹⁴⁵ Prison authorities lacked medical facilities and were

¹⁴³ *Oputa Panel Report* Vol.3 Chapter 7, 183, italics for emphasis.

¹⁴⁴ *Ibid.* at 190

¹⁴⁵ *Ibid.*

required to seek leave of the military authorities before obtaining medical attention for inmates. On many occasions, inmates died before the required permission was obtained.¹⁴⁶ In addition, juveniles were lumped with adult detainees and suffered similar deprivations.¹⁴⁷ The special needs of female detainees were not met. Their reproductive rights were violated in addition to the violations suffered by their male counterparts. Some female inmates had babies in custody. Some were sexually assaulted.¹⁴⁸

In similar vein, the special public hearings on violations of human rights by the Police formed an important aspect of the Panel's work. The Oputa Panel found that there is an historical perspective to human rights violations by the Nigerian Police. The Nigeria Police Force, as stated above, was created as an instrument of colonial hegemony. In furtherance of the colonial divide and rule system, the recruitment policy was to employ individuals to police ethnic groups whose language the policemen did not understand and who were in fact historically hostile to the latter's places of origin as mentioned earlier.¹⁴⁹ This impacted negatively on police-public relations. The Police had continued to act as an imperial force. A careful audit of the petitions on violations of human rights by the Police, notably on extra-judicial killings, revealed that most policemen alleged to have been involved, were indeed from ethnic groups different from those of victims.

Further, the incorporation of some police officers by the early military administrations into governance, as a matter of political expedience, also played a notable role in police violations of human rights. However, the relationship between the military and the

¹⁴⁶ *Oputa Panel Report* Vol.3 Chapter 7,185

¹⁴⁷ Ibid. 192-194.

¹⁴⁸ Ibid. 194-195.

¹⁴⁹ Ibid. 209-214.

Police went awry, with the latter becoming the under-dogs. The Police, as an institution, was neglected by successive military regimes, just as its officers were no longer included in the distribution of plum political positions. The Police was starved of funds, training, promotions and development. In frustration, the Police took vengeance against the civil populace.¹⁵⁰ Violations of rights by the Police included illegal arrests, detention without trial,¹⁵¹ and various forms of torture in the course of investigations to elicit 'confessions.'¹⁵² Extra-judicial killings of suspects in custody, hapless motorists, passengers and pedestrians on the roads, were also common.¹⁵³ In the course of the public hearings, the Oputa Panel found the Police were in the habit of killing people unlawfully. In the bid to cover up, they usually alleged such victims were armed robbers.¹⁵⁴ The Oputa Panel identified several structural factors that predisposed the Nigerian Police to gross violations of human rights.¹⁵⁵ Notable among them were laws which precluded judicial review of executive action, corruption, low qualification requirements for enrolment and deficient training.

The Oputa Panel recognised the limitations arising from its public hearings as a forum to ventilate the scale of the gross violations of human rights that had taken place in the country in a period covering almost three decades. In order to secure a comprehensive picture of the violations, it commissioned research reports by experts. The research work by experts was also expected to provide a valuable background of human rights violations in the country and thus assist the Oputa Panel to contextualise and facilitate its work.

¹⁵⁰ *Oputa Panel Report* Vol.3 Chapter 7, 214-219.

¹⁵¹ *Oputa Panel Report*, Vol.3, Chapter 7, 220-223.

¹⁵² *Ibid* at 223.

¹⁵³ *Oputa Panel Report* Vol.3 Chapter 7, 227-228.

¹⁵⁴ *Oputa Panel Report* Volume 2, Chapter 5, 193.

¹⁵⁵ *Ibid.* at 228-237.

Research Reports: Giving Voice to the Voiceless

Commissioned experts helped it to obtain a fuller picture of the extent of human rights violations in the country. Their relatively wider reach than the public hearings of the Oputa Panel offered useful insights into the extent of gross violations of human rights during the authoritarian period in Nigeria. For purposes of the research, the country was divided into geo-political zones. The six zones, North-East, North-Central, North-West, South-East, South-South and South-West (each comprising six States), have since acquired semi-official recognition in the Nigerian polity.

The North-East and North-West

The research report on the North-West and the North-East showed that the nature and pattern of gross human rights violations in the two zones were similar.¹⁵⁶ There were common incidence of compulsory acquisition of land from individuals and communities by the state and 'powerful' individuals, without consultation or compensation. Unlawful arrests, detentions and extra-judicial killings by the Police and other security agencies of the state constituted the predominant features of rights violations in the two zones.

Arbitrary dismissal and retirement of workers by government without appropriate compensation, discrimination against 'non-indigenes' - and extortion of peasant farmers by traditional rulers were also frequent.¹⁵⁷ The Oputa Panel emphasised the need to thoroughly investigate the cases to establish 'who played what role' and the need to either restore illegally acquired land, or ensure payment of adequate compensation.¹⁵⁸

The South-South

¹⁵⁶ *Oputa Panel Report* Volume 6, Chapters 1 and 4

¹⁵⁷ *Oputa Panel Report* Vol.3, Chapter 1, 11-27 and Chapter 4, 115-120

¹⁵⁸ *Ibid.* at 26-27.

The South-South zone covers the States of the Niger Delta. As noted above, here lies the zone produces the oil that constitutes about 90% of the country's exports. Yet, it lacked basic infrastructure like electricity, health care facilities, potable water, roads and sufficient employment opportunities. As noted by the Oputa Panel, 'it is this paradox and apparent tragedy that forms the political economy of human rights violations in the area.'¹⁵⁹ The nature of gross violations of rights in the area varied from the right to life, social rights, cultural rights, to environmental rights. But most human rights violations in the Niger Delta involved communities.¹⁶⁰

The research identified multinational oil corporations as one of the major culprits for the deplorable state of affairs in the Niger Delta. This is especially with regard to ecological devastation and degradation occasioned by their neglect of international standards in oil exploration activities.¹⁶¹ Deep-seated feelings of alienation and neglect led to the emergence of ethnic and minority groups agitating for the rights of the peoples of the area. The response of the Nigerian military-dominated political scene was to unleash repression on the leaders and members of such groups. A classic example is the environmental degradation of Ogoniland and violation of group rights in the oil producing community.¹⁶²

¹⁵⁹ Oputa Panel Report Vol. 3 Chapter 2 , 28, 28

¹⁶⁰ *Oputa Panel Report*, Vol. 3 Chapter 2, 43-52, chronicles instances of such deprivations.

¹⁶¹ Ibid. 32-33, see page 55-59 for few examples.

¹⁶² The situation in Ogoniland attracted international attention and was subject of *The Social and Economic Rights Action Centre v Nigeria (SERAC Case)*, a communication to the African Commission on Human and Peoples' Rights. The applicants alleged that the oil exploration activities of Shell have caused environmental degradation and health problems resulting from the contamination of the environment among the Ogoni People.¹⁶² In its decision handed down at its 30th Session held between 13 and 27 October 2001, the African Commission found in favour of the Ogoni but its recommendation was not implemented by the Nigerian government. It is only recently (2016) that the Nigerian government initiated the clean-up of Ogoniland. For a discussion of this communication and the issue of economic, social and cultural rights in the region, see Hakeem O. Yusuf 'Oil on Troubled Waters: Multinational Corporations and Realising Human Rights in the Developing World, with Specific Reference to Nigeria' 8 (1) *African Human Rights Journal* 79

The Oputa Panel concluded that the extent of the crisis and human rights violations in the Niger Delta was so profound that it 'touches on the moral conscience of the Nigerian state.'¹⁶³ Despite the damning situation, researchers confronted apathy from some respondents. There was the preference in some quarters to forget the past. The Oputa Panel's researchers also confronted the challenge of bureaucratic responses from government agencies and officials and inadequate information in respect of rights violations during the Nigerian civil war.¹⁶⁴

The North-Central

The research conducted on human rights violations in the North-Central zone revealed that contestations over traditional institutions and practices, land, resources, systemic deprivation and discrimination, feelings of marginalisation (indigene, non-indigene dichotomy) and neglect were the major sources of human rights violations. So were the excesses of law enforcement agents and partisanship on the part of public office holders in the discharge of their duties.¹⁶⁵ It emerged that strong attachments to traditional institutions and practices were at the root of violent riots and conflict across religious and ethnic divides. There were also numerous cases of discrimination against women, deprivation of child rights, ethnic and tribal minorities as well as other vulnerable groups in various communities in the zone.

The researchers also found that due to the dearth of civil society and pro-democracy groups in the zone (agitating for human rights) in comparison with others, there were few cases of state sponsored extra-judicial killings. However, the zone had its 'fair share'

¹⁶³ *Oputa Panel Report*, Vol. 3 at 33.

¹⁶⁴ *Oputa Panel Report*, Vol.3, Chapter 7, 30-34.

¹⁶⁵ *Oputa Panel Report*, Vol.3 at Chapter 3

of 'state terrorism' in the number of military officers and civilians executed for alleged coup plots.¹⁶⁶ Uniquely, one of the States in the zone, Kogi, submitted a memorandum to the Panel alleging deliberate neglect and marginalisation by the federal authorities. It demanded a ten-year 'federal equalisation development plan' to redress the situation.¹⁶⁷ There were many instances of overzealousness and abuse of office by public-office holders in the zone too. A curious instance was when the state-ordered arrest of 27 school children for jubilation at the reported death of General Abacha, the country's most notorious military ruler.¹⁶⁸

The South-West

In the South-West, the research reviewed 568 cases of human rights violations. The research report on the zone relied substantially on data garnered from secondary sources. These included media reports, annual reports of official bodies and non-governmental organisations. It also benefited from informal sessions with some human rights organisations. Violations of the right to life and respect for human dignity, freedom of expression, social and economic rights all featured prominently in the report. Cases of unlawful arrest and detention as well as inhuman treatment, brutality, torture (sometimes resulting in death) and extortion were also recorded.

Extra-judicial killings and alleged state-sponsored, politically motivated assassinations were markedly common in the zone from 1984 to 1999, the second spell of military rule in the country. Such killings were allegedly perpetrated largely by the police and other security agencies in the course of official engagements or otherwise. Politically

¹⁶⁶ Ibid. at 73

¹⁶⁷ *Oputa Panel Report*, Vol.3, Chapter 3, 94-95

¹⁶⁸ Ibid. at 104

motivated murder was directed at various leading political figures.¹⁶⁹ Virtually all such cases remain unresolved to date. In some cases, perpetrators have not been identified. In others, they have not been prosecuted, despite identification. In yet others, the prosecutions have been stalled. Notable in this last category is the trial of some very high-ranking military officers for murder and attempted murder of some leading political figures in the zone.¹⁷⁰

In the region, renowned for its vibrant media, the Press was also a victim as freedom of expression came under severe attack during the long years of military rule. The violations in this regard ranged from arrests and detention of journalists, arraignment for serious but unfounded offences, arson attacks on media houses, to proscription of publications. Periods of political transition programmes organized by the military regimes but subsequently aborted, were particularly traumatic in the South-Western region. Most notably, a crisis was engendered by the death of Chief Moshood K.O. Abiola in custody in 1998 following the annulment of the presidential election he had won in 1992.¹⁷¹ On the economic and social fronts, workers were victimised for their membership of workers' unions and some were illegally dismissed. Also, the introduction of high school fees, violations of academic freedom, deterioration in educational facilities, forceful evictions as well as demolition of homes and shelter of the poor without alternative accommodation or compensation, all made the list of violations of human rights in the zone. As in some other parts of the country, many cases of rights violations were not reported for fear of reprisals. This was also due to ignorance, poverty, or sheer apathy.

¹⁶⁹ *Oputa Panel Report* Vol.3, Chapter 5, 124-126.

¹⁷⁰ *The State v. Lt. General Ishaya Bamaïyi & 4 Ors.*

¹⁷¹ *Oputa Panel Report*, Vol.3 129-132.

The South-East

The report on the relatively homogenous South-East zone cited the Nigerian civil war as the major 'backdrop' for analysing human rights violations in the country in general, and the zone in particular. The principal complaints on gross violations of rights in the South-East zone were essentially of a group nature. They were either in connection with the conduct of the civil war, to which the zone was the theatre, or the aftermath. A common complaint was that of marginalisation. It was alleged that the federal government actively pursued a programme of exclusion and marginalisation of the zone in virtually every aspect of national life and socio-economic development. At the individual level, violations of the right to life and fair hearing were reportedly the most common. On this score, the complaints followed the pattern in the other five zones of the country, principally the South-West. Thus, the report cited a number of cases of extra-judicial killings, unlawful arrests and detentions, extortion and labour related violations.¹⁷² However, the Oputa Panel noted that the research report on the zone relied mainly on secondary sources (books and panel of enquiry reports), a fact that raised some concerns on its objectivity.¹⁷³

Recommendations of the Oputa Panel

The general tenor of the Oputa Panel's recommendation was for institutional transformation. This was with particular reference to the Prisons, Police, the security agencies and the armed forces. Law enforcement and state security services should be given a re-orientation to recognise and accord citizens their human rights as a matter of course. It called for the introduction of human rights awareness training for the Police

¹⁷² *Oputa Panel Report* Vol. 3 166-171.

¹⁷³ *Ibid.* at 148-149.

and other security agencies. To combat the appalling human rights record of the Nigerian Police, the Oputa Panel recommended structural reforms in the nation as a whole. As part of the initiative towards institutional transformation, it called on the National Assembly to repeal all obnoxious legislation in the country and facilitate law reform. It advocated institutional reform of the Police and legislative initiative to 'promote police effectiveness, civility and accountability, and reduce police violation of human rights.'¹⁷⁴

Disturbed by the spate of deaths in custody, the Oputa Panel recommended the establishment of an autonomous inquest system to investigate deaths in custody – this recommendation remains unrealised. It proposed the establishment or designation of separate detention facilities for persons waiting trial and a powerful autonomous monitoring agency to oversight all custodial centres. The Panel called for a viable prison decongestion programme and provision of adequate medical facilities in the prisons. It concluded that the reformation of the criminal justice system as a whole was the only way to secure the rights of detainees.¹⁷⁵ The Panel also suggested lustration and disbarment from public office, of those found culpable of gross violations of human rights.¹⁷⁶ The state should take steps to compensate victims of rights violations, and investigation and prosecution of culpable officials should be undertaken where appropriate. Apart from financial and material reparations, it also recommended that government carry out symbolic reparations for victims. These could take the form of public holidays and establishment of monuments in recognition of the violations they suffered.

¹⁷⁴ *Oputa Panel Report* Vol.3 Chapter 4 at 241.

¹⁷⁵ *Ibid.* 202-207.

¹⁷⁶ *Ibid.* at 45-51

The Panel specifically recommended the demilitarisation of the South-South zone, compensation for victims of rights abuses including families of victims of the civil war and review of the regulatory framework for the oil industry. This was in addition to its advocacy for a 'locally driven' comprehensive plan to develop the zone.¹⁷⁷ One of the general recommendations of the Oputa Panel was the need to integrate human rights education into the academic curricula at all levels of education in the country. It called for the promotion of human rights studies to promote inter-ethnic harmony. The Oputa Panel also recommended measures to address the imbalance in Ibo representation at all levels of national life. This was necessary to assuage feelings of discrimination and marginalisation of the Eastern part of the country.

The Oputa Panel further recommended a re-conceptualisation of what constitutes human rights violations in the country. In apparent reference to political and civil rights, it criticised what it viewed as an over-emphasis on 'elitist- driven' notions of rights like freedom of speech, association and so on, on the part of rights advocates and activists.¹⁷⁸ It called on human rights activists to devote reasonable attention to the advocacy and defence of economic, social and cultural rights. The call was important considering that social, economic and cultural rights unlike civil and political rights are still non-justiciable in Nigeria.

An important theme that emerged from the public sittings and research reports of the Oputa Panel is the allegations of marginalisation by virtually every major or minor ethnic group in the country. However, there appears to be some politics to the claims of marginalisation. It has been argued by some like Obe, that the Oputa Panel ought to

¹⁷⁷ Ibid. at 64-66.

¹⁷⁸ *Oputa Panel Report* Vol. 3, Chapter 1, 3.

have inquired into the specifics of the claims of marginalisation in light of the various dimensions of the phenomenon

There are different areas of marginalisation...there is the fact of marginalisation and there is the perception of marginalisation. In fact, there is also the third element, that people say we better also play marginalisation so that whatever is claimed for marginalised people can come to us. Let us get our share or whatever is reserved for the marginalised.¹⁷⁹

As Abdul Raufu Mustapha has noted in this regard too

the real problem lies not in the marginalization of this or that group per se, but in the inadequate formulation and/or implementation of previous reforms, their politicization, and the rising pressures of poverty.

However, as mentioned above, the report of the Oputa Panel has hardly been subject of positive government action. The government at the time attributed its inaction to the Supreme Court decision in on a challenge to the powers of the Oputa Panel in the *Oputa Panel* case¹⁸⁰ which was instituted by some former heads of State and their security chiefs who refused to attend the panel's public hearings to testify on the Dele Giwa petition.. It is important to consider the petition and the case. However, it is relevant to consider an important gap in the work of the Oputa Panel which arguably contributed to the negative role played by the judiciary in the transitional justice efforts in the country.

Judicial Accountability: An Important Gap

The absence of accountability of the judiciary for the past was a marked feature of the truth-seeking process in Nigeria as the Oputa Panel did not extend its focus to accountability of the judiciary for its role in past governance. This left a major gap in the

¹⁷⁹ Interview with Ayo Obe 2017.

¹⁸⁰ Mentioned above.

accountability process for which *truth-seeking* was instituted. Yet, the rule of law had become so severely compromised that Justice Olajide Olatawura whose judicial career was largely spent under military authoritarian rule, observed that:

During the Military regime, the law became weak as a result of ouster and suspensions of the constitution and existing laws which gave us liberty and freedom. The constitutional duty to protect the liberty and freedom of the citizens by the state was regularly breached by those entrusted with that sacred duty...The rights of citizens were not only ignored but trampled on.¹⁸¹

The judiciary, as one of those 'entrusted with that sacred duty,' was much implicated in, and bears some complicity for the violation of human rights and mis-governance in the country.

The Oputa Panel was headed by a retired justice of the Supreme Court and it does appear a combination of a traditional view that judicial independence will be compromised played a major part in lack of advertence to the judicial role in the years of authoritarian rule. The fact that legal professionals dominated the workings of the Oputa Panel as they may have struggled to be critical of their own colleagues.¹⁸² Still, a number of issues call for accountability of the judiciary for its role in governance during the authoritarian period. It was a notorious fact that criminal and civil trials (and appeals) went on in many cases for years and sometimes decades, a fact that was readily acknowledged by the judiciary. The criminal justice administration system, of which the judiciary formed an important part, was in shambles. Despite the close working relationship between the institutions which were subjects of the special

¹⁸¹ Justice Olajide Olatawura, retired Justice of the Supreme Court of Nigeria and former administrator of the National Judicial Institute, *Welcome Address at the 1999 All Nigeria Conference of /Judges' Conference* (1 November 1999) in National Judicial Institute, 1999 All Judges Conference XXV (2000).

¹⁸² See Hakeem O. Yusuf *Transitional Justice, Judicial Accountability and the Rule of Law* (Routledge Abingdon 2013).

hearings of the Oputa Panel, it did not advert to the need for including the judiciary in those hearings. It is important to note that there were obvious references to the judicial role by the respective institutions involved in the special hearings.

It was impossible to discuss the work of the prisons and the police without reference to the role of the judiciary in the criminal justice system. In fact, as stated above with reference to the Prisons, the hearings revealed that delays in the criminal trial process were implicated in the congestion of the prisons. As stated earlier, thousands of citizens languished in prisons awaiting trials for years on remand warrants signed by judges. Similarly, civil cases took decades in some cases with many dying awaiting justice without official acknowledgment or compensation. Fundamentally too, military legislation made in violation of due process and human rights were upheld by the judiciary. In other words, there was judicial acquiescence to, and legitimization of military usurpation of power, constitutional distortions, gross mis-governance and violation of human rights.¹⁸³

In the circumstances, it was logical to expect that the truth-seeking process, which examined what went wrong in the polity, could only be regarded as complete and objective if it focused on the judiciary as an important institution of governance during the authoritarian period. However, the Oputa Panel scarcely made reference to the role of the courts in the violations of human rights in the country. As stated earlier, the judiciary is held out as a major reason for the non-implementation of the report of the Oputa Panel. The deficit in accountability of the judiciary has continued to haunt the judicial function and its attempts at self-redemption in particular, and the post-

¹⁸³ Hakeem O. Yusuf 'Calling the Judiciary to Account for the Past: Transitional Justice and Judicial Accountability in Nigeria' (2008) 30 (2) *Law and Policy* 194.

authoritarian governance and democratisation in general.¹⁸⁴ It is now apt to return to the Dele Giwa petition and the judicial decision which emanated from it with serious implications for the truth-seeking process in the country.

The Dele Giwa Petition

Dele Giwa was a prominent and fearless investigative journalist, editor and publisher of *Newswatch*, a leading newsmagazine in Lagos. He was allegedly murdered by military intelligence through a letter-bomb on the orders of the General Ibrahim Babangida then military Head of State, on 19 October 1986. Efforts by his solicitor, Gani Fawehinmi, to investigate and prosecute those responsible were frustrated by the military.¹⁸⁵ The struggle to establish the truth about the murder shifted to the Oputa Panel following its inauguration. Fawehinmi submitted a petition against General Babangida and his two security chiefs in which he made a case for the matter to be reopened. The Oputa Panel issued summons for the appearance of the ex-Military ruler and his two security chiefs accused of complicity in the matter but none obeyed. Rather, the trio went to the High Court with an *ex parte* application to restrain the Oputa Panel from summoning them. They were similarly supported by two other former military Heads of State, Generals Muhammadu Buhari and Abdusalami Abubakar. It is relevant to note that while the former is the current Nigerian President (elected into office in 2015), the latter midwifed Nigeria's political transition to civil rule in 1999.

¹⁸⁴ See Hakeem Yusuf 'Rule of Law and Politics of Anti-Corruption Reform in a Post-Authoritarian State - The Case of Nigeria' (2011) 22(1) *King's Law Journal* 57; Hakeem O. Yusuf 'The Judiciary and Political Change in Africa: Developing Transitional Jurisprudence in Nigeria' (2009) 7 (4) *International Journal of Constitutional Law* 654; Hakeem O. Yusuf 'Democratic Transition, Judicial Accountability and Judicialisation of Politics in Africa: The Nigerian Experience' (2008) 50 (5) *International Journal of Law and Management* 236.

¹⁸⁵ For an account of the murder and the efforts to secure justice for the family of the victim, see Richard Akinnola *Murder of Dele Giwa: The Answered Question* (Nigerian Union of Journalists, Lagos 2010).

In the *Oputa Panel* Case referred to above the generals sought, among other things, a declaration that the President lacked the powers to act under the existing law to establish a body like the Oputa Panel for the whole country. They also asked the court to stop the Oputa Panel from exercising the power to summon them. They claimed it contravened their right to liberty. Meanwhile, a legal team applied to represent the generals at the Oputa Panel's public hearing. That did not go down well with the Oputa Panel. Fawehinmi and other counsel also opposed their appearance. The contentious issue was whether the Oputa Panel, acting under Section 5 of the TIA, had the power to issue and serve summonses on three ex-military rulers. Could a summoned witness who failed to appear give evidence by proxy, namely through legal counsel? Whether having disobeyed the summons to appear in person, could they be allowed to cross examine witnesses of the Oputa Panel? The TIA did not provide for proxy representation of witnesses.

The Oputa Panel decided that personal attendance of the summoned generals was required for the proper fulfilment of the Oputa Panel's mandate. Specifically, the Panel in its 'ruling' insisted that witnesses were bound to attend in person in order to be entitled to the rights of legal representation, and (cross) examination. Although many petitioners or witnesses were represented by counsel, they were in attendance to be examined themselves. Justice Oputa emphasised that military officers were not above the law. The Oputa Panel also took the position that a proceeding before a commission of its nature did not constitute adversarial proceedings. For failing to appear, the Oputa

Panel recommended that the generals be deemed to have forfeited their right to govern the country in future.¹⁸⁶

In its decision on the *Oputa Panel* Case, the Supreme Court, constituted by judges who had been appointed during the various military regimes, held that the President lacked the powers to set up a body like the Oputa Panel with a remit that extended to the whole country to enquire into human rights violations. Further, it held that the powers of the Panel to summon the Plaintiffs were a violation of their right to liberty. At that point, the Oputa Panel had concluded and submitted its work. The decision of the Supreme Court placed premium on the rights of the generals to liberty. This was to the detriment of and disregard for the wider rights of victims of gross human rights violations to truth and acknowledgement of their suffering under the country's laws and its obligations treaty obligations under international law referred to earlier.

Challenges to the Truth-seeking Process in Nigeria

The task of truth commissions involves an interrogation of the past and making value judgments. This expectedly attracts challenges of various types. In the case of the Oputa Panel however, there were some avoidable problems thrown in its way from its inception.

Composition of the Panel

As stated earlier, the seven-member panel was headed by Justice Oputa, and that from the onset gave the panel much credibility amongst a highly sceptical populace as to the true intentions of the new government. However, the composition of the panel was strongly challenged for being unrepresentative of the heterogeneous nature of the

¹⁸⁶ *Synoptic Overview Oputa Panel Report* (2004) 87-88.

country. Some segments of the country, specifically Muslims in the North and South, felt alienated by the constitution of the membership. Oputa was a Catholic from the South East and four of the other five members were Christians. Voicing the feelings of the northern Muslim elite, Mohammed Haruna, a seasoned journalist, media and public affairs commentator, faulted the lopsided composition of the Oputa Panel. He dismissed the Oputa Panel as a 'witch-hunt'. The Panel's 'unrepresentative composition,' Haruna argued, was responsible for its highlighting the complaint of some petitioners while neglecting others.¹⁸⁷

In a country where more than half the population is Muslim, and where religion is a sensitive and divisive issue, the Commission's composition was problematic. Moreover, considering the size of the country, the scope of the mandate and the heterogeneous nature of its population, a seven-member panel seemed rather inadequate to effectively cover the diverse range of interests and identities in Nigeria. The Nigerian government did not pay any serious heed to the concerns expressed about the composition of the Oputa Panel. It is important to note that the Oputa Panel, following pre-commencement deliberations with civil society groups, specifically requested an increase in the number of its Commissioners but this was not implemented.¹⁸⁸ No reasons were proffered for government's inaction on the demand. The issue of representativeness of government bodies is usually a contentious one in the country. There is much to be said in support of ensuring a balanced and representative body to carry out such an important process to promote the legitimacy of the process as well as outcome.

Resource Constraints, Timing and Commencement

¹⁸⁷ Mohammed Haruna 'The Oputa Witch-Hunt' *Daily Trust* Online Edition (Abuja Nigeria Wednesday 19 June 2002).

¹⁸⁸ *Oputa Panel Report* Vol. 1 at 51.

By comparative standards, the Nigerian truth commission was a modest undertaking, yet the Oputa Panel was poorly funded. As such, it took over a year before the Oputa Panel began sitting, and at one point it was forced to practically suspend its work because of financial difficulties.¹⁸⁹ In fact, it was only able to commence work with a take-off grant of \$400, 000 from the Ford Foundation as the Federal Government failed to make any budgetary allocation for it in its first year of operation.¹⁹⁰ Haruna argued that there was deliberate financial strangulation of the Oputa Panel by the Obasanjo administration in order to ensure it became a political weapon in the hands of the President against the potential contenders for the presidency in the 2003 elections.¹⁹¹ It did not help matters that the Oputa Panel was not granted its request for specialised departments to enable work like its preferred model, the South Africa TRC.

Largely as a result of the lack of funds, the Oputa Panel was unable to submit its report until May 2002; barely ten months before the 2003 elections. At least two notable ex-military rulers had also openly declared their interest in the presidency. These were Generals Buhari and Babangida who had openly contested attempts to have them testify before the Oputa Panel as stated earlier. There may therefore be some substance in Haruna's charge that 'Obasanjo created [the] Oputa [Panel] essentially for politics and vengeance.'¹⁹² It was presumably easy to hold up the possibility of their being dragged before the Oputa Panel on allegations of gross violations of human rights as a significant deterrent to the two former military heads of state from contesting the presidential elections. There was little or no doubt that appearing before the Oputa Panel had strong

¹⁸⁹ 'Nigeria "Truth Commission" Too Poor to Finish Work' *Business Recorder* (10 January 2002)

¹⁹⁰ E O Ojo 'Human Rights and Sustainable Democracy in Nigeria (1999-2003)' (2006) 13 (1) *Journal of Social Sciences* 15, 23. There is no indication the funding came with conditions.

¹⁹¹ Haruna 2002.

¹⁹² Ibid.

potentials to put the two ex-military heads of state in bad light in the court of public opinion at what was easily the most followed public event in the country's political history.

A Juridicalised Process

The Nigerian public seemed to have viewed the Oputa Panel as more of a juridical forum, than an unencumbered avenue for investigating the past. This is reflected in the fact that so many petitioners, respondents and witnesses, across the board, were represented by legal practitioners at the public hearings. The 'crème de la crème' of the Nigerian legal profession attended the proceedings on behalf of clients. Thirty-three Senior Advocates of Nigeria¹⁹³ are on record to have represented petitioners and witnesses at the public hearings. The list included the foremost legal practitioner in the country at the time, Chief Frederick Rotimi Williams. Over four hundred lawyers also appeared before the Panel. Although a few attended on summons of the Panel (some law officers) most appeared on behalf of clients. Even those who took serious exception to participating in the public hearings (sections of the elite who felt threatened by *the truth*) ensured appearance by legal proxy. Prominent in that category were the three former military Heads of State and some key military security functionaries mentioned earlier. The *juridicalisation* of the truth-seeking process in Nigeria may not be unconnected with the composition of the Panel itself. Not only was it headed by one of the most respected jurists in the country, almost half of its membership were legal practitioners. One of these was a Chief Mudiaga Odje, a leading Senior Advocate of Nigeria.

¹⁹³ The rank of Senior Advocate of Nigeria is the highest rank in the legal profession in Nigeria and the equivalent of the British Queen's Counsel.

An overly juridicalisation in appointment to the membership of a truth-seeking process fosters a sense of adversarial contestation. This does little to advance the core function of the truth-seeking process, a search for the *truth*. If anything, it detracts from it. In recognition of the heavy presence of legal practitioners at the public hearings, lead counsel to one of the former military rulers (General Ibrahim Babangida, who defied the summons of the Panel thrice over), observed that ‘the atmosphere at the panel was too adversarial.’¹⁹⁴ This is despite the fact that he did himself appear with a battery of lawyers and made a case to cross examine witnesses, while not presenting his client for similar purpose.

The Oputa Panel seems to have also set a tone for subsequent truth-seeking processes in the country established by state governments also under respective tribunals of inquiries legislation. Indeed, in the case of the Osun Truth and Reconciliation Commission (OSTRC) established in 2011 to investigate human rights violations committed in the State between 2007 and 2011, six of the seven members were members of the legal profession and so was the Secretary. It was headed by a reputable retired Justice of the Supreme Court, Samson Odemwingie Uwaifo, as was the Rivers State Truth and Reconciliation Commission. The composition of the panels set the tone for the juridicalisation of the commissions as they were both considerably adversarial in their proceedings.

Doubtful Legal Basis and Weak International Support

On the issue of shaky legal foundations of the truth-seeking process, it is relevant to point out that Justice Oputa made a demand following the inauguration of the Oputa

¹⁹⁴ BBC News: ‘Ex-Nigerian Military Ruler Snubs Panel’ (Tuesday 25 September 2001 10:41 GMT 11:41 UK) available at: <http://news.bbc.co.uk/1/hi/world/africa/1562397.stm> (19 April 2017)

Panel for a tailor-made legislation for the HRVIC but his call went unheeded. It is not clear why he back-tracked on the issue and proceeded on what turned out to be a shaky foundation for such a crucial engagement. The lesson to be learnt is not to proceed with the delicate process of truth-seeking without specific 'made-to-fit' legislation. Such legislation is required to clearly spell out the powers and limits of the process.

The Oputa Panel did not generate much international interest. While there may have been some international attention in the initial stages of the Oputa Panel, this did not translate into positive advantage for the Panel's work and was certainly not sustained during its most crucial stages. For example, the non-implementation of the final report and recommendations, including reparations for victims, has hardly attracted international censure till date. Likewise, the Oputa Panel received neither the attention nor support of the official organs of the United Nations, unlike previous post-conflict or post-authoritarian truth-seeking initiatives elsewhere. The exception to this international 'blackout' was the financial lifeline extended by the Ford Foundation, mentioned earlier when funding from the government was not forthcoming. The major focus of the international community and the funders was on prioritising and supporting the country's democratic election processes. Thus for instance, the European Union, the Carter Centre, the Organisation of African Unity (now African Union), the Commonwealth among others, all supported the transition election process but did not focus on transitional justice.¹⁹⁵

Although now largely a matter of conjecture, it is quite plausible that international attention, monitoring and support for the truth-seeking process in Nigeria may well have changed the course of its work. If the international spotlight had been focused on

¹⁹⁵ See for instance *Observing the 1998-99 Nigeria Elections* (2

the work of the Oputa Panel and its constraints, all arms of government, particularly the executive and judiciary, would likely have been more proactive in ensuring the Oputa Panel's success, knowing that it would constitute a litmus test for the commitment and sincerity of the Obasanjo regime to democratic values and the rule of law. Unfortunately, the important moment of transition now appears irretrievably lost.

The Aftermath

A Tool for Legitimising the Obasanjo Government

The period of military rule generally and that of the Abacha regime specifically (1993-1998), led to Nigeria acquiring a pariah status in the international comity of nations.¹⁹⁶

As the Oputa Panel noted in its report

it is in the struggle against military rule that the more immediate origin of the Commission is to be sought, for the democratic struggle kept the issue of arbitrary rule and state-sponsored violence...on the agenda of political discourse in the country...the transition would be incomplete...if the past was not confronted.¹⁹⁷

It was clear that Chief Obasanjo was conscious of the hostile domestic and international political environment that had developed against military rule in the 1990s. There was for instance the country's suspension from the Commonwealth of Nations in 1995, a forum in which she was easily the most important African member. Similarly, Nigeria's international image as a frontline player in the anti-apartheid struggle as well as her enviable record of peace-keeping in various parts of the world was virtually in tatters. Relevantly too, at a personal level, the newly inaugurated President, Chief Obasanjo had acquired a reputation as a leading African statesman. He was co-chair of the inaugural

¹⁹⁶ Warris Alli 'Nigeria's Foreign Policy of Democratic Transition and Economic Reforms' in *Governance and Politics in Post-Military Nigeria : Changes and Challenges* Said Adejumobi (ed). Palgrave McMillan. 145-172.

¹⁹⁷ *Oputa Panel Report* Volume 1 Chapter 2, 24

Commonwealth Eminent Persons' Group established in 1985 on how to dismantle apartheid in South Africa.¹⁹⁸ As President he was confronted by the challenge of Nigeria's appalling human rights record which had been considered as being in violation of the country's international human rights obligations by the United Nations.¹⁹⁹

With the Oputa Panel in place, the country had a mechanism in place ostensibly geared toward recovering justice for victims of decades of gross violations of human rights and thereby redeem the country's name and position in the comity of nations. President Obasanjo actively sought and received international welcome in the various parts of the world with his 'shuttle diplomacy' that formed a major part of his first four-year term of office and which facilitated his quest for foreign direct investment (FDI) in the country.²⁰⁰ On the domestic plane, the Obasanjo administration was also felt to be committed to the pursuit of justice for victims as a measure for reconciling the nation as he had promised during his election campaign. At the time, renowned playwright and Nobel Laureate, Professor Wole Soyinka – otherwise one of President Obasanjo's most ardent critics – commended him for establishing the Oputa Panel noting that:

¹⁹⁸ Commonwealth Network 'Eminent Persons Group' available at: <http://www.commonwealthofnations.org/commonwealth/eminent-persons-group/> (accessed 28 May 2017).

¹⁹⁹ *Human Rights Violations Investigations Commission Report (Oputa Panel Report) Volume 1*. Chapter 3, p. 12. Chapter 6 of the same volume provides concise details of various international human rights oversight bodies' findings and recommendations on flagrant human rights violations in the country (at 21-58). See also Economic and Social Council Commission on Human Rights Fifty-third session Items 8 and 10 of the provisional agenda E/CN.4/1997/62 (4 February 1997).

²⁰⁰ Efem N. Ubi, Oluwatooni O. Akinkuotu 'Nigerian Foreign Policy and Economic Development, 1999–2013' (2014) 17 (4) *International Area Studies* 414-433, 423.

Obasanjo has got this one right. Its timing is laudable – human rights commission, truth tribunal or whatever it is as we have repeatedly stressed, is the priority of priorities after the experience under recent dictatorships.²⁰¹

In hindsight, such optimism was misplaced. The early promise by the Nigerian government to facilitate justice and reconciliation through a truth commission now appears suspect at best.

President Obasanjo commended the Oputa Panel for its job well done, noting that the public hearings had the strong potential to serve as a deterrent to the violations of human rights in the country.²⁰² However, till the end of its tenure, the Obasanjo administration refused to publish or implement the Oputa Panel Report based on the Supreme Court discussed earlier.

Although the government maintained that it was constrained from taking the Report further as a result of the judgement it failed to provide a basis for its decision from any part of the judgement. Thus, the premise for the Obasanjo administration's position remained vague and it attracted widespread condemnation. Many groups and individuals have made repeated requests for the release and or implementation of the Report. The calls for positive action by the government have however been consistently ignored. Critics of the government position noted at the time that the Supreme Court did not 'bar' the government from releasing the Report.²⁰³

There is no unanimity on the effect of the Supreme Court judgement on enforceability of the recommendations. While some agree that the decision may have rendered nugatory

²⁰¹ 'Righting the Wrongs of the Past: Human Rights Panel Investigates the Past with a View to the Future' A Special International Report Prepared by *The Washington Times* Advertising Department cited in Yusuf 2007.

²⁰² *Oputa Panel Report* Vol. 2 Chapter 2, 40.

²⁰³ Guardian Editorial, 'Oputa Panel: Matters Arising,' *The Guardian* on Sunday Online Edition (Lagos 19 December 2004).

aspects of the recommendations that related to the plaintiffs, they contend that the Supreme Court judgement was no excuse to 'suppress the truth.'²⁰⁴ Others, including the President of the West Africa Bar Association at the time, insisted the Supreme Court in fact endorsed the Panel and that its creation was in any case valid under international conventions to which the country is party.²⁰⁵ Thus, the government ought to implement the recommendations.

Consequent to the government's failure to publish the report of the Oputa Panel, some civil society groups, including one which consulted for the Oputa Panel, proceeded to publish it on the internet.²⁰⁶ Another coalition known as Civil Society Forum published the hard copy of 'The Executive Summary, Recommendations and Conclusions.' The group observed that in all events, the Supreme Court judgement did not bar publication of the Report.²⁰⁷ They considered that the people can find other ways of getting the recommendations of the Panel implemented, despite the intransigence of government. The group also suggested that organising a referendum on them is one such way. This informed their determination to ensure the full publication of the Report for mass education and action.²⁰⁸

Governance Gap, Unreformed Institutions and Impunity

The failure of the Obasanjo administration and the continued silence of its successor administrations on the matter have been telling. Three administrations have been in office since Obasanjo left power in 2007. None of them has visited the Oputa Panel

²⁰⁴ K Oderemi 'Reopen Deaths of MKO, Kudirat, Dele Giwa, Others-Oputa Panel's Report' *Sunday Punch on the Web* (Lagos Nigeria Sunday 2 January 2005).

²⁰⁵ Femi Falana 'When Will Leaders Pay for their Iniquities?' *This Day* (Lagos Nigeria 20 December 2004).

²⁰⁶ S Olokojobi 'We'll Publish Original Oputa Report- Fayemi of CDD' *The Daily Independent* (Lagos Saturday 11 December 2004).

²⁰⁷ Oderemi 2005.

²⁰⁸ Oderemi 2005.

Report. Rather, two separate administrations have convened two national conferences to discuss the problems bedevilling the Nigerian polity without an articulated reference to the need for a focus on implementing transitional justice measures. The main interest of the political elite has been the need to 'restructure' the country for the devolution of power²⁰⁹ without which the country will 'break'.²¹⁰ The political elite and government at various levels have been remarkably silent on the issue of (non)implementation of the report of the Oputa Panel. Still, the non-implementation of the wide-ranging recommendations of the Oputa Panel has been viewed as one of the cardinal reasons for the continued agitation by some segments of the country on a number of issues.

Nigerian society continues to pay a heavy price for the failure to adequately implement transitional justice. More than a decade and half after the military left power, a myriad of conflicts that have since ensued to challenge institutional reform, good governance and development in the country. Since 2009, Nigeria has been caught in the grip of serious acts of violence; bombings, killings and destruction of property linked to the *Boko Haram*. The north-east Nigeria-based, Islamist insurgent group demands the establishment of an 'Islamic State' at least in the Northern part of the country as well as the unconditional release of its detained members. Some accounts attribute the group's violence to religious fanaticism or Islamic 'revivalism'; typical of wider international narratives of terrorism.²¹¹ The official narrative between 2010 and 2015 was that the group was set up by forces opposed to the administration then in power. The government was led by President Goodluck Jonathan, a Christian from the minority Ijaw

²⁰⁹ Johnson Agbakwuru 'What Restructuring Means in Practical Terms by ABC Nwosu' *Vanguard* (17 July 2017) <http://www.vanguardngr.com/2017/07/restructuring-means-practical-terms-abc-nwosu/> (accessed 17 July 2017).

²¹⁰ Raymond Mordi and Leke Salaudeen 'Restructuring on Front Burner as Akinrinade Presents Book' *The Nation* (04 May 2017).

²¹¹ Walker 2012, 9-10.

ethnic group from the Southern part of the country. In any event, the situation provides ample evidence of the danger inherent in neglecting to address the impunity that was the defining feature and legacy of the colonial and authoritarian period. This is especially the case with violations of economic and social rights which have left vast numbers of the population pauperised and vulnerable to manipulation of a few who are able to mobilise sections of the society under the guise of ethnicity or warped religious ideology.²¹²

The Boko Haram insurgency also brought to the fore how the handling of security issues has hardly been intelligence led, but rather militarised, dating back to the military era. In 2012, Bukar Abba Ibrahim, a Senator (and former Governor of Yobe State) representing parts of the epicentre of the *Boko Haram* insurgency, denounced security agencies for killing more people than the *Boko Haram* and making matters worse for the people, contrary to official claims. He noted that *Boko Haram* had existed for 'ages' as a peaceful group but the impunity of the security agencies, particularly the police, provoked it to violence against the state. He lamented that whenever a soldier was harmed in any way, the army responded by cordoning off such an area and burning down all property there. 'What,' he wondered 'has [burning] property got to do with people killing security agents on the road?'²¹³

Beyond adroit lip-service, little by way of substantial institutional reform of policing has taken place in Nigeria in the post-colonial period. Policing arrangements are such that despite the large population running into an estimated 150 million people, there is only

²¹² See Hakeem O. Yusuf 'Harvests of Violence - Neglect of Basic Rights and the Boko Haram Insurgency' (2013) 6 (3) *Critical Studies on Terrorism* 371 – 391; Olabanji Akinnola 'Boko Haram Insurgency in Nigeria: Between Islamic Fundamentalism, Politics, and Poverty' (2015) 8 (1) *African Security* 1-29.

²¹³ Onyedi Ojiabor and Sanni Onogu 'Buhari's Stand on Boko Haram Rattles Presidency' *The Nation* (Abuja 9 November 2012) <http://thenationonline.net/buharis-stand-on-boko-haram-rattles-presidency/>

one federally-controlled police force in the country. Calls for State control and community policing to enhance effectiveness and legitimacy of the police have remained largely ignored for decades. Policemen are still accommodated in barracks, a continuation of a colonial practice to ensure they could be promptly deployed to quell any resistance to the colonial government.²¹⁴

CURRENT CONTEXT: CHALLENGES TO TRANSITIONAL JUSTICE

Transitional justice has more or less hit a road-block in Nigeria. On the one hand the country has been in 'safe' pairs of hands. As Ogbara noted,

the military deliberately handpicked some of their own men to handle key offices...apart from Obasanjo; the Senate Presidency was occupied by General David Mark [rtd] for eight good years. How do you expect the Constitution will be amended to accommodate fundamental rights for Nigerians?²¹⁵

On the other hand, civil society has been largely fragmented and disconnected from the people. Civil society efforts to hold government to account after the political transition in 1999 has diminished compared to the experience during military rule. As Akiyode-Afolabi noted '...a lot of things are happening and people are not talking about it because there is generally some kind of fatigue.'²¹⁶

However, calls for justice for the past has not ceased in the country. Calls for the implementation of the recommendations of the Oputa Panel have been ongoing though this has not been organised in any systematic form. For instance, victims of the alleged 1995 coup who had variously suffered torture, premature and unjust dismissal from military service had all been hopeful that President Obasanjo's personal experience

²¹⁴ Clement Nwankwo, Mbachu, D. and Ugochukwu, B. *Human Rights Practices in Nigeria Police Constitutional Rights Project Lagos* (1993) 70.

²¹⁵ Interview with Nurudeen Ogbara 2017.

²¹⁶ Interview with Abiola Akiyode-Afolabi 2017.

would galvanize him into action for securing justice for other victims of that alleged coup and similar others. They have remained sorely disappointed at his subsequent inaction.²¹⁷ Expressing disappointment with the subsequent lack of implementation of the Oputa Panel's recommendations regarding the 1995 phantom coup, one of the victims recently stated in an interview:

I am appealing to the Federal Government to implement the recommendations of the Oputa Panel. We need to reach some form of closure on this matter. They must realise that what goes around comes around.²¹⁸

There have been some calls by individual victims and public commentators for the implementation of the report of the Oputa Panel. However, a concerted, streamlined, and organized platform for such demands has not emerged. This remains a significant challenge in the transitional project in the country. The civil war ended on the note of 'unity', namely that the secession bid was quashed and the country kept as one. As noted above, the military leadership generally rejected calls for accountability for its nearly three decades in power. The rejection was pursued through the courts and ostensibly sealed through a judicial process. Nonetheless, there is a political narrative of nationalistic patriotism advanced by the military on its role in the country that is strategically marshalled against the articulation or pursuit of any accountability agenda for its conduct while it was in power. The core of the narrative is that of its historical, 'patriotic' role of keeping the country together during the civil war. The narrative is to the effect that the military perpetually deserves the nation's gratitude for preserving the territorial integrity and unity of the country and the debt of gratitude owed to the

²¹⁷ Bayo Akinloye 'Obasanjo is Not Example of a Good Leader – Cmdr Omessa' *Punch* (Lagos 23 April 2017).

²¹⁸ Ibid.

military for this service trumps any wrongdoing on its part, including impunity, large-scale corruption and gross violations of human rights.

Gate-Keeper Politics, Nepotism and Corruption

The legacy of authoritarian rule connects closely with the colonial past. Both are marked by violence and exploitation and constitute major factors in the failed project of transitional justice in Nigeria. Former military rulers have been conscious gate-keepers of their legacy of political misrule, grand corruption, gross violations of human rights and impunity. They remain keen to ensure only one of their numbers or designated candidates can be trusted to hold the reins of political power where it matters most. Consider in this regard that Nigeria has had four presidents in the period of transition to civil democratic governance. Two have been former military Heads of State, Olusegun Obasanjo (1999-2007) and Muhammadu Buhari (2015-). Obasanjo openly imposed the two others on the ruling party at the time; late Musa Yar'Adua (2007-2009) and Goodluck Jonathan (2009-2015). Thus, as indicated above, the post-authoritarian period in the country has had either a former military ruler or his designated candidate as the elected executive president of Nigeria. It is important to bear in mind that Nigeria is a federal state, modelled after the USA's presidential system. In a country where the President has wider constitutional powers than the American President, that is a critical issue for any attempt at social transformation. This has meant that the military, despite 'ceding' power, continue to influence democratic politics and thus there has been little appetite for thorough transitional justice.

The ploy to keep accountability for impunity perpetrated by previous military regimes has been particularly focused (extensively but not only) at the federal level. Especially in the first elections after military rule, erstwhile military rulers (governors, ministers

and heads of strategic public institutions) contested and won elections as state governors and members of the federal parliament. Rich, retired senior military officers who had held political office played active and usually leading roles in supporting and sponsoring candidates for elections. A former military governor and minister was Senate President for eight years and is still a member of the Senate.²¹⁹ In the circumstances, it is easy to understand how the 'transition moment' was lost and the appetite for revisiting the past has become unremarkable despite its deleterious effect on the present.

The control of the country by the military extends beyond regular, formal institutions of government. Traditional rulership remains relevant in governance and power configurations with varying levels of importance in the country, the military have also kept an eye out to secure its power-interests. Thus for instance, several military officers, including former generals who had held key service positions, governorship and ministerial positions during military rule retired to take up important traditional rulership in the Northern part of the country. This is particularly significant for two reasons. First, as indicated earlier, former military officers have emerged as traditional rulers in some of the most important traditional ruler-ship positions including the two highest positions in the historically significant Sokoto Caliphate (Sultan of Sokoto and Emir of Gwandu).²²⁰ In other situations where non-military officers have emerged, powerful military officers have been 'powers behind the throne' playing decisive roles in the choice of who is appointed as traditional rulers. Second, it is relevant to note that in the

²¹⁹ Eighteen years on at the time of writing in 2017.

²²⁰ To mention a few, the current Sultan of Sokoto, Sa'ad Abubakar III and the assumed head of Muslims in the country is a retired military officer of the rank of Colonel in the Nigerian Army. Most of his military career was during the period of military rule. A former Emir of Gwandu, Mustapha Jokolo (now late) was a Major in the Nigerian Army. The Emir of Zuru is a retired Army General. This is to mention a notable few.

Northern part of the country especially, the traditional political institution remains both an integral part of formal state structures of governance unlike other parts of the country and, like other parts of the country, also exerts an informal but equally influential power over the people in their respective domains. Thus, holding office at that level provides a significant source of power that can be, and indeed is used, to maintain a status quo of impunity.

Nepotism has also been a mechanism for maintaining a status quo of unaccountability for gross violations of human rights. A former military administrator became a State Governor as did a former Chief of Naval Staff. The son of the latter was recently elected into the federal Senate. Some military apologists, contractors, business acolytes or relations of former military officers who had held public office, contested and won elections. This was an important feature of the first decade of the post-authoritarian political transition and remains the case to varying extents. The son-in-law of a former military head of state is currently a governor of their state in the northern part of the country. Another ex-Head of State's son-in-law was governor in a State in the North for eight years. Even the judiciary is not immune from the influence of the military. Quite apart from the fact that many judges appointed by the military across the hierarchy of the State and federal judiciary (including its highest levels) remain on the bench, some are family members and close relations of former military rulers. For example, the wife of a former head of state only recently retired as a Chief Judge of a State and a wife of the former Chief of Naval Staff mentioned earlier is a judge of the federal high court.

Corruption is another important factor impeding transitional justice in the country as recent investigations into the handling of the *Boko Haram* insurgency demonstrates. Security issues have been exploited as a major source for grand corruption of sometime

mind-boggling proportions. This has become evident from the revelations that have since emerged following investigations by the Buhari administration into the activities of the office of the National Security Adviser (NSA) as well as the handling of the military budget of the Jonathan administration (2010-2015).²²¹ It has emerged that the office of the NSA was allegedly used as a conduit for sharing out huge sums of money running into over \$15 billion dollars for the 2014/15 re-election campaign of President Jonathan.²²² Simultaneously, the heads of the army, the navy and the air-force were also allegedly engrossed in embezzling millions of dollars throughout the period the country was facing the Boko Haram insurgency in the Northern part of the country. Funds for the payments of troops and procurement of arms and ammunitions were being diverted into the accounts of military chiefs.²²³

Meanwhile, thousands of troops mutinied for lack of weapons and non-payment of salaries and, or allowances in the 'war' against Boko Haram insurgents. Many of such troops were arrested, court-martialled, convicted, some sentenced to death and many

²²¹ Andrew Agbese 'Nigeria: Dasukigate - U.S.\$15 Billion May Have Been Stolen - Lai Mohammed *Daily Trust* (Abuja 11 May 2016); Richard Akinwunmi 'Dasukigate: Probe Panel Summons 241 Firms over Arms Scandal' *Premium Times* (Abuja 10 January 2016) available at:

<http://www.premiumtimesng.com/news/196512-dasukigate-probe-panel-summons-241-firms-over-arms-scandal-full-list-here.html> (accessed 14 May 2017).

²²² Dimeji Kayode-Adedeji 'Dasukigate: We Rejected Jonathan's \$3 million - Islamic Groups' *Premium Times* (Abuja 27 December 2015) available at:

<http://www.premiumtimesng.com/news/headlines/195797-dasukigate-we-rejected-jonathans-3-million-islamic-groups.html> (accessed 14 May 2017); Evelyn Okakwu 'Dasukigate: More Witnesses Testify against Olisa Metuh' *Premium Times* (Abuja 28 January 2016) available at: <http://www.premiumtimesng.com/news/top-news/197574-dasukigate-witnesses-testify-olisa-metuh.html> (accessed 14 May 2017); Hassan Adebayo 'Dasukigate: Guardian Newspapers Lied, it was Part of NPAN Decision to Collect N120 million - Obaigbena' *Premium Times* (Abuja 15 December 2015) available at: <http://www.premiumtimesng.com/news/headlines/195133-dasukigate-guardian-newspapers-lied-it-was-part-of-npan-decision-to-collect-n120-million-obaigbena.html> (accessed 14 May 2017).

²²³ *BBC News* 'Nigerian Ex-Military Chiefs in Arms Fraud Probe' (London 15 January 2016); 'Former Nigerian Defence Chief Denies £10m Fraud Charges' *The Guardian* (London 7 March 2016); *BBC News* 'Nigeria's Dasuki Arrested over \$2bn Arms Fraud' (London 1 December 2015).

jailed.²²⁴ In similar vein, in April 2017, the Secretary to the incumbent Federal Government of President Muhammadu Buhari was suspended and eventually dismissed from office following allegations of corrupt enrichment through the awards of shady contracts running into millions of dollars from the funds of the Presidential Initiative on North East (PINE). PINE is a government initiative to coordinate the government's programme for addressing the humanitarian crisis generated by the *Boko Haram* insurgency.²²⁵ Further, institutional moves to bring development to the restive Niger Delta have also been 'hobbled' by corruption ranging from the Presidential Amnesty Programme: established to grant amnesty to and rehabilitate former militants; the interventionist Niger Delta Development Commission: established to facilitate rapid infrastructural development in the short term to the region; to the Ministry of the Niger Delta established to bring focused, long term development to the region, the experience has been that of monumental corruption by officials at virtually every level of the various bodies.²²⁶

The foregoing initiatives indicate the government is beginning to re-direct attention to the need for transitional justice in the country. Significantly, the Buhari administration has begun to demonstrate the need for substantive transitional justice measures for victims of the *Boko Haram* insurgency, the Niger Delta and some victims of the civil war.

²²⁴ Nnenna Ibeh '12 Soldiers Who Shot at GOC in Maiduguri Sentenced to Death' *Premium Times* (16 September 2014 Abuja) <http://www.premiumtimesng.com/news/headlines/168196-12-soldiers-who-shot-at-goc-in-maiduguri-sentenced-to-death.html> (accessed 05 July 2017)

²²⁵ Hassan Adebayo 'How 'Shady' Companies Bribed SGF Babachir Lawal to make Billions from Boko Haram Victims' Fund' *Premium Times* (Abuja 3 May 2017) <http://www.premiumtimesng.com/news/headlines/230224-exclusive-shady-companies-bribed-sgf-babachir-lawal-make-billions-boko-haram-victims-fund.html>; Maggie Fick 'Nigeria's President Orders Probe into Missing Aid Funds: Top Civil Servant Suspended over Humanitarian Crisis Contracts' *Financial Times* (London 19 April 2017) <https://www.ft.com/content/e1262094-250d-11e7-8691-d5f7e0cd0a16?mhq5j=e1> (accessed 08 July 2017).

²²⁶ International Crisis Group 'Curbing Violence in Nigeria (III): Revisiting the Niger Delta' Crisis Group Africa Report N°231, 29 September 2015.

In November 2017, the legislature passed legislation creating the North East Development.²²⁷ This is to ensure government commits to the reconstruction of infrastructure in the North East devastated by the *Boko Haram* insurgency. Further, sequel to case brought by some victims of the civil war before the court of the Economic Community of West African States (ECOWAS Court), the Nigerian government agreed to pay victims N88 billion. In a consent judgment, the government is to pay the N50 billion to the victims across eleven states in the south east, south-south and north central zones of the country. The government will pay N38 billion to two companies appointed and designated by the victims to rid the war-affected areas of bombs and explosives which have continued to constitute a danger in various public and private places including places of worship, schools and farms. Significantly too, the companies are expected to carry out certain specified construction works. In addition, the government is to establish a National Mine Action Centre for victims to be located in the South eastern part of the country.²²⁸ These developments are coming at a time the government also approved the payment of long withheld pensions to military, paramilitary and police men and officers who crossed over to fight on the Biafran side during the civil war.²²⁹ The pensions had remained unpaid for 47 years. These are all only at their commencement or declarative stages. It remains to be seen how victim-focused they would be and there remains a big question mark on institutional reforms for forestalling impunity.

Conclusion

²²⁷ Levinus Nwabughogu 'How We Conceived, Processed, Passed NEDC — Speaker Dogara' *Vanguard Newspaper* (Lagos 6 November 2017); 'Interview: North-East Leaders will Carry the Shame Forever if NEDC is Mismanaged – Dogara' *Premium Times* (Abuja 2 November 2017).

²²⁸ 'FG Agrees to Pay N88bn Compensation to Victims of Biafra War' *Vanguard Newspaper* (Lagos 30 October 2017).

²²⁹ Queen Esther Iroanusi 'Nigerian Govt to Commence Pension Payment of Biafran Veterans' *Premium Times* (Abuja 18 October 2017).

The transitional justice approach in Nigeria has been to preserve the existing structures of power which sustains the *status quo* of dominance for the local elite that took over political and economic control in the country. Truth-telling, trials, lustration, acknowledgment or any other measures that deliver justice for victims or institutional reforms is conceived as a threat to the power of the local elite. As a result, the engagement with transitional justice measures by the local elite has been on protecting their privileges and powers and substantively, little else. A combination of factors; including poor planning, lack of sincerity on the part of the government and absence of political will, played out to frustrate transitional justice efforts in the country. Also, it did not help matters that transitional justice was absent from the international community's engagement with Nigeria's political transition process with the interest focused essentially on democratisation.

The implementation of transitional justice in the post-authoritarian/military era in Nigeria has largely been a failure. Even the symbolic trials, commenced soon after the political transition, became moribund due to political and technical factors. The lustration measure that was implemented has at best produced a crop of very powerful ex-military officers. The group emerged as key political players in the transition to civil governance with largely ill-gotten wealth secured from years of authoritarian rule. The lustration process was only directed at disengaging this crop of officers from active military service and nothing else. Since they were not barred from seeking elective office, they have emerged as a strong force on the political front. Benefitting from their deep-pockets, they have assumed key elective positions or sponsored candidates for elections to protect their interests.

Worse still, the major mechanism for obtaining accountability and justice for victims of impunity—the truth-telling process—was frustrated by a combination of dynamics. The most prominent of the dynamics is the deficiency of sincerity on the part of the initiating regime. As a process, the truth-telling mechanism did a commendable job of seeking to establish the *truth* about the course of executive and legislative governance in the authoritarian period. It assisted the bid to legitimise the post-authoritarian civilian administration, but the value of its well-received work remains questionable. The search for justice, truth and reconciliation through the Oputa Panel suffered a fundamental setback in its lack of tailor-made legislation. Such legislation would have made provisions for its functions as a truth commission for the whole country with the power to summon witnesses as required. Further, the law would have specified the duty of the government to cooperate with the truth commission and respect Nigeria's obligations under international law.

The search for truth and reconciliation in Nigeria through the Oputa Panel suffered a fundamental set back in its lack of tailor-made legislation. One of the crucial issues that ought to be addressed by such legislation, as the legal challenge to the Oputa Panel showed, is the jurisdictional scope of the process within a federal polity like Nigeria. The incident of power-sharing between the central and state governments dictated the need for legislation that validly defined the scope of the powers of a truth commission. It is relevant to note in this respect for instance, that state governments had powers similar to that of the president to establish a commission along the lines of the Oputa Panel in their states under various (though similar) Tribunals of Inquiry Laws. Indeed, both Rivers and Osun States (in the South-South and South-West regions) of the country

respectively, established truth commissions following periods of political violence and human rights violations.

There is a widely-held view that the transition to democracy has failed to deliver on justice and restoration of the rule of law. Rather, impunity and state-sponsored violence have remained unchecked, if not increased, in the country. A militarised psyche has taken hold in the polity and reflects also in the attitude of political office holders who flout court orders with impunity. Hopes for a new dawn in the wake of the transition have gone largely unfulfilled. The Nigerian government, in jettisoning the *Oputa Panel Report* with its wide-ranging recommendations for accountability and institutional reforms, has contributed significantly to the current state of affairs. Nonetheless, there are those who hold the optimistic view that the report of the Oputa Panel will provide a solid basis of action for a future government with political will to implement its recommendations. As Akinnola stated in this regard, 'some people will still have to face the music over some of the things that happened. There's no way they can run away. We will get the government that has the will power to implement some of these recommendations.'²³⁰

²³⁰ Interview with Richard Akinnola 2017.